NO. 85-1590

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PHILIP J. KIRK, JR.,

Petitioner,

v.

THOMAS S., appt'd guardian
ad litem, JOYCE BROOKS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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9 pp

QUESTIONS PRESENTED

1. Does the Fourteenth Amendment liberty interest defined by *Youngberg v. Romeo*, 457 U.S. 307 (1982), protect an individual who is not involuntarily committed to a State institution and require the State to provide him with an array of community services based upon his status as the ward of a State-appointed guardian, even when professional judgment has been exercised on his behalf first in a State institution and subsequently in the community?

2. Is the State responsible under *Youngberg v. Romeo, supra,* for providing community-based services to a non-institutionalized individual when such services must be delivered by local area mental health authorities under North Carolina law?

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PHILLIP J. KIRK, JR.,*

Petitioner,

v.

THOMAS S., appt'd guardian
ad litem, JOYCE BROOKS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Attorney General of North Carolina, on behalf of Phillip J. Kirk, Jr., substituted automatically for appellant Sarah T. Morrow, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 9, 1986.

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*The other party to this case on appeal was Allen Childress, guardian for respondent Thomas S.

OPINIONS BELOW

The opinion and judgment of the court of appeals (Appendix A at A-1-24) is reported at 781 F.2d 367. The order of the court of appeals denying a Petition for Rehearing en banc (Appendix B at A-25-26) is unreported, as is the court of appeals' order denying the Motion for Stay of Mandate. (Appendix C at A-27). The order of the district court (Appendix D at A-28-35) is reported at 601 F.Supp. 1055. The final judgment of the district court is unreported. (Appendix E at A-41-46).

JURISDICTION

The opinion and judgment of the court of appeals (Appendix A at A-1-24) was entered on January 9, 1986. A timely Petition for Rehearing en banc was denied on February 19, 1986 (Appendix B at A-25-26) and a Motion for Stay of Mandate was denied on February 26, 1986 (Appendix C at A-27). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> §1—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves selected provisions of Chapter 122 of the General Statutes of North Carolina reproduced in the appendix *infra*. (Appendix J at A-60-66).

STATEMENT OF THE CASE

Respondent Thomas S. is a twenty-two-year-old resident of Gaston County, North Carolina who is mentally ill and of borderline intellectual functioning but who is not mentally retarded. On January 12, 1982, he was adjudicated incompetent and Allen Childress, a State employee, was subsequently appointed as his guardian of the person and the estate. On March 15, 1982, Childress voluntarily admitted respondent to Broughton Hospital, a State-owned and operated psychiatric hospital, where he received treatment and habilitation.

On July 7, 1982, this action was filed by Paul Caldwell as "next friend" pursuant to 42 U.S.C. §1983 on behalf of the respondent Thomas S. for alleged violations of his constitutional right to treatment. Defendants included Sarah Morrow, then Secretary of the North Carolina Department of Human Resources, and respondent's guardian Childress. Respondent also named as defendants local governmental officials, including the directors of the Gaston County Department of Social Services and the Gaston-Lincoln Area Mental Health, Mental Retardation and Substance Abuse Program (hereinafter "area mental health program") and the Gaston County Commissioners.

Respondent claimed that all defendants had failed to provide him with minimally adequate treatment in the least restrictive setting. Respondent claimed that his treatment violated his personal liberty, his freedom of movement and his freedom from restraint. He alleged violations of his substantive due process and procedural due process rights under the Fourteenth Amendment as well as violation of his

rights under North Carolina state law. Respondent sought both declaratory and injunctive relief.

The evidence is undisputed that respondent not only failed to regress but showed marked improvement while receiving treatment at Broughton Hospital. At Broughton, respondent was placed on Unit R, a certified Intermediate Care Facility-Mental Retardation Unit. Unit R provided active treatment and training in basic self-care skills, including food preparation and occupational therapy. Respondent improved in all areas of adaptive functioning as well as in physical health, motivation and academic performance. There is absolutely no evidence in the record that respondent was ever subject to bodily restraints or unsafe conditions while a patient at Broughton.

In the fall of 1982, respondent's treatment team determined that he had "received maximum benefit from training and counseling in the institutional setting and [was] ready for community placement," although "[p]ending placement in the community, Thomas's hospitalization at Broughton Hospital remained appropriate." On March 3, 1983, respondent was discharged from Broughton Hospital by a state district court judge on the recommendation of respondent's hospital treatment team based on his positive responses to appropriate therapeutic treatment. Respondent was subsequently placed in a series of community-based treatment settings under a contract for residential, treatment and case management services between the area mental health program and Play Units for the Severely Handicapped (hereinafter "PUSH").

On August 17, 1984, respondent was placed in the Night Care program for residential living while he participated in a separate day treatment program, both operated by the area mental health program. Night Care is not a state facility but rather is an unlocked residential program

located in the same building as a social setting detoxification program. Currently, respondent resides with a private foster family in Lincoln County, North Carolina under contract with PUSH.

On September 18, 1984, the district court allowed respondent's motion for summary judgment against petitioner Kirk and Childress. (Appendix D at A-28-35). The court found that respondent had not received appropriate treatment during his stay at Broughton Hospital in view of the standards enunciated in *Youngberg v. Romeo*, 457 U.S. 307 (1982). The court held that respondent had been deprived of his liberty interest protected by the Fourteenth Amendment because he was placed at Broughton Hospital at the time the action was filed and continued to be subject to the guardianship of Childress. (Appendix at A-28-32). The court further dismissed respondent's pendent state law claims and dismissed without prejudice all claims against the various local defendants. (Appendix D at A-28-35).

On December 7, 1984, the district court ordered that petitioner Kirk and Childress provide specific mental health and residential services to respondent. (Appendix E at A-41-46). The court also granted the motion for class certification and motion to intervene, but stayed further litigation on these issues pending disposition of the appeal. (Appendix F at A-47-50, Appendix G at A-51-55). In an order dated January 2, 1985, the district court granted petitioner's motion for certification of the judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. (Appendix I at A-58-59)

On January 9, 1986, the Fourth Circuit Court of Appeals affirmed the judgment of the district court with modification regarding the duties of respondent's guardian. The court of appeals held that the liberty interests identified by this Court in *Youngberg v. Romeo, supra,* did not arise because of institutional confinement but that respondent's liberty interests were violated because he remained "a legally

incompetent adult who is a ward of a guardian appointed by the State." (Appendix A at A-14-16). The court further held that respondent had not received minimally adequate treatment consistent with professional judgment because he was placed in a night care unit after his earlier placements were terminated, and respondent's "safety was threatened by his aggressiveness and his attempted suicide." (Appendix A at 16-19). The court also held that the State of North Carolina was responsible for respondent's treatment in the community and could provide such treatment through local area mental health authorities or otherwise, and that there were no genuine issues of material fact which precluded summary judgment. (Appendix A at A-18-20)

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for certiorari because the court of appeals improperly extended the Fourteenth Amendment liberty interest identified in *Youngberg v. Romeo* by requiring the State to provide optimal treatment to an individual who was no longer confined in a State institution. The court of appeals misapplied the standard set forth in *Youngberg* and ignored the decision of other circuits interpreting *Youngberg* in concluding that respondent was deprived of his liberty while residing in a community setting and that petitioner's treatment professionals failed to exercise professional judgment. Certiorari should therefore be granted to correct the misapplication of the law by the court of appeals and to resolve the conflict among the circuits regarding the duty of the State to protect the rights of a non-institutionalized individual.

I. The court of appeals erroneously afforded greater substantive due process rights to respondent because of his status as a ward of the State-appointed guardian although he resided in a community setting. (Appendix A at A-15-16). The court of appeals misapplied *Youngberg* in holding that treatment professionals failed to exercise professional

judgment or deliver minimally adequate treatment because respondent's treatment constituted a substantial departure from accepted professional judgment. (Appendix A at A-16-17).

These conclusions ignore the standard set forth in *Youngberg*. Respondent's personal security and freedom from undue restraint were never jeopardized either in Broughton Hospital or in subsequent community placements. The record was uncontroverted that respondent received intensive training at Broughton which made community placement eventually possible. Although respondent's guardian voluntarily placed him in a succession of unlocked facilities, including placement with a family care home, a group home, a rest home, the Night Care program and a foster care family, respondent was consistently accorded minimal treatment which satisfied his Fourteenth Amendment liberty interest. Moreover, respondent was not "institutionalized" and therefore was not similarly situated to the respondent in *Youngberg*. Respondent was not "wholly dependent on the State" as discussed in *Youngberg*, and therefore the State had no constitutional duty to provide services and care to him irrespective of his living situation.

In addition, the appointment of a legal guardian as an impartial individual who assists the incompetent in exercising his rights does not deprive a ward of his liberty under *Youngberg*. Nor does such appointment per se mandate a constitutional right to treatment, regardless of the ward's residence. *See, Parham v. J.R.*, 442 U.S. 584 (1979). Clearly the court of appeals has imposed an affirmative duty to furnish treatment under the Fourteenth Amendment far beyond that contemplated by this Court.

Second, even if respondent were somehow confined by the State, the record here showed that the treatment professionals always acted to protect respondent's safety and freedom from unreasonable restraints. The court of

appeals ignored the presumed validity of the decisions made by treatment professionals who actually implemented respondent's treatment program in the community. Instead, the court rejected the mandate of *Youngberg* and specified which of several professionally accepted choices should have been made.

The court of appeals erroneously held that respondent's rights were violated because the recommendations of Broughton professionals were not followed by community service providers. Even if such recommendations had not been followed, however, the court misconstrued the rationale of *Youngberg* which afforded a presumption of validity to the decisions of *treating* professionals. Thus, the court of appeals failed to afford any deference whatsoever to the judgment exercised by qualified professionals and ignored this Court's admonition that the federal judiciary should minimize its interference with the internal operations of state mental health institutions.

Here, the judgment of qualified professionals at Broughton Hospital was entitled to a presumption of validity under *Youngberg* only insofar as they decided respondent's course of treatment at Broughton. Their recommendations concerning the course of respondent's treatment in the community upon discharge were mere suggestions to other care providers. Differences among treatment professionals do not mandate the finding that professional judgment has not been exercised. Whether such judgment has been exercised is the proper standard for determining whether the rights of an institutionalized individual have been adequately protected. *Youngberg*, 457 U.S. at 321, 323.

The court of appeals clearly failed to show any deference whatsoever to the decisions made by those professionals who actually arranged and provided respondent's community treatment. James B. McKelvey, the

professional who functioned as respondent's case manager and who coordinated the planning and implementation of respondent's community placements subsequent to his discharge from Broughton Hospital, considered respondent's community placements to be fully "appropriate" or to "substantially meet Thomas' needs." The record indicates that even respondent's subsequent admission to the Night Care or partial hospitalization program was an appropriate interim solution pending placement again in a specialized foster care situation and clearly represented an exercise of professional judgment.

The court clearly erred in finding that respondent did not receive minimally adequate treatment consistent with professional judgment. Rather, a review of the evidence shows that respondent's course of treatment was clearly consistent with professional judgment, or at the very least that genuine issues of material fact remain which preclude summary judgment.

In addition to the evidence that respondent improved because of the active treatment he received at Broughton Hospital, the court of appeals also ignored substantial evidence in determining that respondent did not receive treatment in the community consistent with the recommendations of Broughton professionals. The court apparently reached its conclusion because respondent resided at the Night Care program at the time of the district court's judgment. The court concluded that no professional ever recommended this living arrangement and therefore it was a substantial departure from professional judgment. Such a conclusion is refuted by the record. A Broughton psychologist evaluating respondent had opined that "night hospitalization and full time day involvement in the local community" could be considered as an appropriate treatment modality for respondent. In addition, a Broughton psychiatrist stated by affidavit that respondent's treatment team had recommended as a part of his discharge

planning "placement during the interim in a respite facility operated by the Gaston-Lincoln Area Mental Health Program." The only such respite care facility available, and the one referred to by the psychiatrist, is the Night Care program. Respondent was placed in this residential program only after a series of other living arrangements had to be terminated due to respondent's difficult and impulsive behaviors. The court thus ignored evidence that the treating professionals worked assiduously to provide appropriate treatment and residential services in the community. Thus, under the guise of *Youngberg*, both the district court and the court of appeals have fashioned a new standard for substantive due process rights which was never contemplated by the Court in *Youngberg*.

Finally, the court of appeals' decision conflicted with those of other circuits which had properly construed the meaning of *Youngberg*. The panel ruled that neither *Society for Goodwill to Retarded Children v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984), nor *Phillips v. Thompson*, 715 F.2d 365 (7th Cir. 1983), was relevant because those decisions did not involve professional judgment concerning the appropriate treatment for a specific individual. However, the existence of a class is not the salient factor in determining the State's concomitant duties to a citizen arising out of a Fourteenth Amendment liberty interest. The application of substantive due process rights is not predicated on the number of individuals involved. The court of appeals apparently determined that an individual has more extensive due process rights than members of a class of individuals. This distinction clearly was not contemplated by the Fourteenth Amendment to the Constitution.

The second circuit in *Society for Goodwill to Retarded Children* examined the opinions of qualified professionals concerning the treatment of the named class members. The court concluded that even if all professionals agreed that the

plaintiffs would be better off outside an institution, the "professional judgment" standard enunciated in *Youngberg* has nothing to do with what would make patients "safer, happier and more productive." Instead, the court's decision adopted the principles of *Youngberg* in holding that constitutional standards have been met when the professional who actually made the treatment decision in fact exercised "professional judgment" at the time the decision was made. The court stated that "the ultimate issue is whether patients' basic liberty interests are being safeguarded, not whether the optimal course of treatment as determined by some experts is being followed." 737 F.2d at 1248. Thus, the second circuit followed the precedent of *Youngberg* and adopted the rationale of those circuits which held that there is no constitutional right to a "least restrictive environment." *See, Rennie v. Klein*, 720 F.2d 266 269 (3d Cir. 1983); *Johnson by Johnson v. Brelje*, 701 F.2d 1201, 1210 (7th Cir. 1983).

Further, the court of appeals ignored the reasoning by the seventh circuit in *Phillips v. Thompson*. The court found that residents who were voluntarily placed in state institutions were entitled to a constitutional right to movement and training. Yet these class members were only entitled to minimally adequate training to exercise their right to liberty of movement. The court further examined whether professional judgment had been exercised. Here, the court of appeals ignored all evidence that professional judgment had been exercised and that respondent has continuously received training to enhance his liberty of movement. The decision of the court of appeals therefore directly conflicts with other circuits without any reasonable basis for distinction.

II. Secondly, the court of appeals erroneously held that under *Youngberg* the State is solely responsible under the Fourteenth Amendment for providing community-based treatment to a non-institutionalized individual, even

though such services must be delivered by local area mental health authorities under North Carolina law. The district court dismissed all claims against the local agency defendants without prejudice. Yet the Fourteenth Amendment and the Court's holding in *Youngberg* do not require that the State provide community treatment to a non-institutionalized individual such as respondent. Moreover, the means of delivering such treatment is governed by the applicable provisions of State law.

North Carolina law expressly provides that community services are a joint undertaking by the North Carolina Department of Human Resources and the area mental health authorities. N.C. Gen. Stat. §122-35.37 (current version at N.C. Gen. Stat. §122C-111 (1985 Cum. Supp.)). Further, local area authorities are established by the local boards of county commissioners with the approval of the Department of Human Resources, and members of the area mental health boards are appointed by and serve at the pleasure of the county commissioners. N.C. Gen. Stat. §§122-35.36(2), -35.39 (current versions at N.C. Gen. Stat. §§122C-115,-118 (1985 Cum. Supp.)). Moreover, the area authorities are responsible for insuring that agencies which contract for the provision of services, such as PUSH, shall meet the Commission for Mental Health, Mental Retardation and Substance Abuse Services' rules and minimum standards. N.C. Gen. Stat. §122-35.49(a) (current version at N.C. Gen. Stat. §122C-142 (1985 Cum. Supp.)).

Here, petitioner does not directly oversee the delivery of services to mentally impaired individuals in the community. Although the state must approve the annual plan of services for each area program, the area program determines the type of care and treatment an individual will receive in the community. *See,* N.C. Gen. Stat. §122-35.43 (current version at N.C. Gen. Stat. §122C-143) (1985 Cum. Supp.)). Nor has the decision of any North Carolina court with

precedential value ever held that an area mental health authority is a mere agent of the State in delivering local treatment.

The court of appeals misapplied the standard in *Youngberg* by holding that the State was responsible for such services in the community under the Constitution and that State law only mandated that petitioner could provide the required treatment through local authorities. (Appendix A at A-18-19). In so holding, the court of appeals mistakenly relied on the decisions in *Vaughn v. North Carolina Department of Human Resources,* 296 N.C. 683, 252 S.E.2d 792 (1979), and *Milner v. Trend Community Mental Health Services,* Docket TA 7353 (N.C. Indus. Comm'n Nov. 10, 1981), *aff'd* (N.C. Indus. Comm'n July 28, 1982).

Vaughn v. Department of Human Resources is inapposite. In *Vaughn,* the court held that under the Tort Claims Act, a county director of social services was the agent of the Social Services Commission solely for the placement of children in foster homes in view of the commission's statutory authority to direct the manner in which the placements are made. The Social Services Commission has adopted standards which delineate in minute detail how the county director must fulfill this function. 296 N.C. at 686-91, 252 S.E.2d at 795-98. Most importantly, North Carolina law *expressly* provides that a county director shall act as the agent of the commission in work required by that body. N.C. Gen. Stat. §108-19(5) (current version at N.C. Gen. Stat. §108A-14(5) (1985 Cum. Supp.)).

Here, the court of appeals ignored the fact that petitioner had no regulatory or administrative control over the role of the local area mental health authority in planning and delivering respondent's community treatment. The requirements set forth in *Vaughn* to create an agency relationship

simply do not exist regarding area mental health authorities. Although the Department of Human Resources must approve an annual plan prepared by the area mental health authority, that authority sets its own priorities as to how it will serve the various disability areas. N.C. Gen. Stat. §122-35.43. Moreover, the allocation of additional funds to the area mental health authority at its request, based on a perceived need identified by that authority, indicates no such control.

The decision of the North Carolina Industrial Commission in *Milner v. Trend Community Mental Health Services, supra,* is without precedential value for any other tribunal and is not controlling here. The Industrial Commission predicated its decision on express findings that the Department of Human Resources possessed the requisite control over the particular local government action involved. This control was derived from mandatory standards promulgated by the Commission for Mental Health, Mental Retardation and Substance Abuse Services governing a physician's prescription of and treatment with medication. There is no evidence in the record that petitioner retained the right to control or to direct the manner in which respondent's treatment and placement were effectuated. Consequently, the court of appeals erroneously imputed a greater degree of control to petitioner than is specifically provided in North Carolina law. Petitioner is not solely responsible for respondent's care and treatment.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 27, 1986

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-2254

Thomas S., Joyce M. Brooks, appt'd guardian *ad litem*, — Appellee,

versus

Sarah T. Morrow, Secretary of N.C. Dept. of Human Resources,

and

Allen Childress, guardian for pltf.; Benjamin Carpenter, Director of the County Dept. of Social Services; James Melton, Director of Gaston-Lincoln Area Mental Health Program; Harley B. Gaston, Jr., David Beam, David Hollifield, James Forrester, Dean Carpenter, Robert Heavner, Porter McAteet, Gaston County Commissioners, — Defendants.

No. 84-2255

Thomas S., Joyce M. Brooks, appt'd guardian *ad litem*, — Appellee,

versus

Allen Childress, guardian for pltf., — Appellant,

and

Sarah T. Morrow, Secretary of N.C. Dept. of Human Resources; Benjamin Carpenter, Director of the County Dept. of Social Services; James Melton, Director of Gaston-Lincoln Area Mental Health Program; Harley B. Gaston, Jr., David Beam, David Hollifield, James Forrester, Dean Carpenter, Robert Heavner, Porter McAteet, Gaston County Commissioners, Defendants.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge. (C/A C-C-82-0418-M)

Argued: May 9, 1985 Decided: January 9, 1986

Before WINTER, Chief Judge, HALL, Circuit Judge, and BUTZNER, Senior Circuit Judge.

Cathy J. Rosenthal, Associate Attorney General; Robert Gage; Wilson Hayman, Assistant Attorney General (Cox and Gage; Lacy H. Thornburg, Attorney General; William F. O'Connell, Special Deputy Attorney General on brief) for Appellants; Edward G. Connette; Roger Manus (Harper, Connette & Stovall; Carolina Legal Assistance; Theodore O. Fillette; Legal Services of Southern Piedmont, Inc., on brief) for Appellee.

BUTZNER, Senior Circuit Judge:

The primary issue in this appeal is whether the district court properly applied the principles explained in Youngberg v. Romeo, 457 U.S. 307 (1982). In *Youngberg* the Court recognized that a patient in a state mental institution has a right to "adequate food, shelter, clothing, and medical care." 457 U.S. at 315. *Youngberg* also established that a mentally retarded person involuntarily committed to a state institution retains liberty interests secured by the due process clause of the fourteenth amendment in "safety and freedom from bodily restraint." 457 U.S. at 319. These liberty interests "require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint." 457 U.S. at 319. The Court explained that to determine what training "is 'reasonable'—in this and in any case presenting a claim for training by a State—we emphasize that courts must show deference to the judgment exercised by a qualified professional." 457 U.S. at 322.

Although the facts of this case differ from those in *Youngberg,* we conclude that the district court did not err by turning to *Youngberg* for guidance. The district court held that the state should implement a training or treatment plan prescribed by its own professionals for a young incompetent adult who, from birth, has been a ward of the state or of a guardian appointed by the state. Finding no cause for reversal in the assignments of error, we affirm the order of the district court with but slight modification.[1]

I

Thomas S. was placed for adoption by his mother at his birth in 1963. The Gaston County, North Carolina, department of social services took custody of him until his

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[1] Thomas S. v. Morrow, 601 F. Supp. 1055 (W.D.N.C. 1984). The district court entered a judgment based on the published order and certified it pursuant to Federal Rule of Civil Procedure 54(b).

eighteenth birthday, when he was adjudged incompetent and a guardian was appointed for him. All told, he has lived in more than 40 foster homes and institutions.

Soon after Thomas was born, hospital personnel told the county social worker responsible for Thomas's placement that he was hyperactive and required a "special home to meet [his] needs." Thomas was placed with a licensed foster mother when he was six days old. He lived with her for about five and a half years, until his foster mother "could no longer handle Tom's problems." He then lived in a second foster home for five months. The foster parents asked that he be removed because he bit and clawed the other children and was unable to share, demanding full attention from the foster parents. Thomas was then placed in a group home for disturbed children. He was removed five months later, according to the department of social services, because the group home "could not meet Tom's needs. There was no treatment for him...." In September 1969 Thomas was moved to an institution for emotionally disturbed children, where he remained for one year. There he received therapy and learned to control his inappropriate behavior so he could reside in a less restrictive environment. In September 1970 he was placed in Children's Home of Winston-Salem, where he remained until 1978. During this time, at least four different sets of foster parents gave him occasional respite care.

In February 1977, when Thomas was 13, the social services department decided to reunite him with his mother. Although his mother initially wanted Thomas to live with her, during his visit she decided that she could not cope with him because he was jealous of her other children and physically abused them. He also had tantrums in which he screamed obscenities. Thomas went back to Children's Home and did not see his mother again.

It then became more difficult to cope with Thomas's behavior. He retreated into his own world of model cars, and he attempted suicide several times. In September 1978 he was placed in a receiving home in Gaston County and at the end of that month was placed in Broughton Hospital, one of North Carolina's state mental institutions. He remained there for over a year. At his discharge from Broughton Hospital in February of 1980, Thomas's psychiatrist recommended that he be placed in "a less restrictive setting in the community," preferably "a group home and perhaps later, a halfway house." From February until April 1980, Thomas lived in a group home for emotionally disturbed children. The home requested that he be removed because he frequently ran away and he upset the other children. For the next four weeks, Thomas was housed "in a piece-meal fashion here and there," according to the county department of social services. By May 12, "we had no other place to turn and we brought him to Broughton." At his discharge from Broughton in June 1980, the psychiatrist directing the unit that had cared for him reported that the "[s]taff in all areas affirmed need for Tom to be in less restrictive and less dependent place.... [I]t was felt community placement and outpatient mental health support were appropriate to meet his needs." At Thomas's discharge, he was placed in an emergency shelter in Iredell County and eventually with another foster family.

In June 1981 he was returned to Broughton Hospital, but he was discharged in about a week at his own request and against medical advice. Thomas was then placed at Gerald's Lazy Acres Rest Home for the elderly, where he lived from June 1981 through March 1982.

Thomas reached 18 while living at Lazy Acres, and Gaston County began proceedings to have him declared incompetent. His guardian ad litem sought a psychological and social evaluation of Thomas at the division for disorders of development and learning at North Carolina Memorial Hospital. Psychologists evaluated Thomas's

mental functioning as being on the borderline between average intelligence and mild mental retardation. His social functioning was evaluated as being at "a much lower level," in the moderately mentally retarded range. The social worker on the evaluation team noted that Thomas had "experienced multiple changes in his social environment" in the past ten years. "While a variety of services have been provided him, coordinated planning of services has been difficult and there has been no therapeutic situation available for any length of time since his early adolescence." Consequently, "Tom has lacked for consistent significant persons in his life." The evaluation team concluded that Thomas "needs a stable, very structured environment for three to six years" that would give him "consistency in his social contacts" so that he could "develop trust in interpersonal relationships." Specifically, he needed vocational training, training in social skills, "opportunities for social interaction with peers," and "opportunities to practice in the community the skills he already has and those he will be acquiring before he is discharged from this supervised environment." He "might join a club, participate in structured physical education activities, attend dances or social events." The team summarized: "In planning for Tom, his psychosocial maladjustment is the critical issue that must be addressed."

Thomas was adjudged incompetent. In February 1982 Allen Childress, regional adult mental health specialist with the North Carolina department of human resources, was appointed Thomas's guardian. The guardian visited Thomas at Lazy Acres and decided that the rest home was an inappropriate placement. The guardian later commented on Thomas's condition at the time: "He weighed 197 pounds and was taking five separate medications, which effectively subdued is personality. He was the only person of his age in that rest home. He had no peers in the rest home. He had no social or recreational or educational or vocational opportunities, and no access to therapeutic

counseling." Sleeping, eating, and listening to the radio were Thomas's main activities at Lazy Acres. He gained at least 25 pounds and became emotionally unstable and hallucinatory. He withdrew again into his world of model cars.

The guardian transferred him to the mental retardation unit at Broughton Hospital, in part to enable the guardian to assess Thomas's needs and to enable Gaston County to identify resources to meet those needs. A few weeks after Thomas's admission to Broughton Hospital, a team of social workers, occupational therapists, and psychologists devised his treatment plan.

> The team feels Tom should be ready for community placement in Gaston County in three to six months. He would be able to live successfully in a co-ed group home for adults (ages 13 to 35) with a Vocational Rehabilitation Sheltered Workshop ... or in a CETA on-the-job training program ... during the day.... Counseling through the Department of Social Services and mental health to address medication needs, behavior problems, if they arise, and emotional needs would be required periodically. The home environment would need to be somewhat structured during non-work hours to provide activities therapeutic to Tom's needs and related to his interests (cars, trucks, fishing, bike riding, outdoors activities).
>
> * * *
>
> Tom basically needs to be a part of a home where he can establish family ties in order to mature and develop through the natural progression of growing up to adulthood. He was hardly ever in any one place long enough to put down any roots.

On June 2, 1982, six weeks after Thomas's admission to Broughton, the Broughton social worker on Thomas's treatment team wrote to the Gaston-Lincoln mental health agency to advise it of Thomas's needs upon his anticipated discharge on June 17:

> We have identified the following needs as priority:
>
> 1. Community-based living either in a group home or adult foster care home
> 2. Sheltered Workshop activites or some type of daily vocational training activity
> 3. Involvement with the local mental health center for medication review and counseling to improve his self-concept/self-esteem
>
> The team feels that Tom basically needs to be a part of a home where he can establish meaningful relationships and that will provide sufficient structure to allow him to mature and develop through a natural progression to adulthood. The team feels that in two to five years, Tom should be able to live in a semi-independent or independent living situation in the community after this maturation process has been completed. The home environment should be structured during non-work hours to provide activities responsive to Tom's needs and related to his interests (cars, trucks, fishing, bicycle riding, and outdoor activities).

Thomas was not released on June 17 as planned. In fact, he was not released until March of the following year. Upon receiving the Broughton social worker's recommendation, the director of the Gaston-Lincoln agency advised the social worker and Thomas's guardian that the mental health agency could offer only outpatient counseling, not residential services. The guardian responded that because

of "the obvious inability of the community to care for Tom at this time, I agreed to recommend the continuation of the commitment to give Gaston County extended time to identify resources appropriate to Tom's need."

In October 1982 the hospital social worker contacted the Gaston County department of social services with a recommendation similar to that previously sent to the mental health agency:

> We recommend that Tom be placed in an MR [mental retardation] group home or other highly structured environment for an extended period of time in order to gain the ability to live independently in the community. Placement of choice is a mental retardation group home for high-functioning males which has an Adult Day Activities Program/Workshop capability. This home should be located in an area which is both willing and able to provide counseling services and medication review for Tom.

In November 1982 a two-day psychological evaluation was made by the North Carolina division of mental health and mental services at Broughton Hospital for the purpose of "determining Tom's needs for community placement." The team of psychologists, social workers, and psychiatrists assessed Thomas's weaknesses as his lack of self-direction and his lack of socialization skills. The reporting psychologist explained that "the reason for these deficits is lack of motivation, lack of freedom with appropriate supervision, and the numerous placements which have resulted in a lack of continuity in training." Thomas's score on intelligence tests had improved to the "dull normal" level of intelligence, and the team concluded that Thomas should no longer be diagnosed as mentally retarded. The psychologist also noted that his social maturity score had improved since the evaluation made one year previously at

North Carolina Memorial Hospital. The psychologist attributed this improvement to "the fact that he has been in a stable environment" for the past eight months.

The nine-page evaluation concluded with seven specific recommendations.

1. Placement in a group home with adults of average intelligence without severe emotional difficulties (stable environment with structure)
2. Counseling by both male and female therapists regarding conflicts in establishing relationships with both men and women
3. Needs exposure to many social situations outside of the institutional environment (e.g. shopping, dining out, short trips, etc.)
4. Attend an Outward Bound Course (21-day course) to help develop his ego, strength, and self-concept
5. Placement in an environment that will allow the perfect balance between supervision and freedom so that Tom will not feel rejected
6. Training in mathematics and money management
7. Training in a specific trade like auto mechanics so that Tom will more likely be able to support himself in the future[.]

On November 24, 1982, the Broughton staff devised a discharge plan for Thomas, prefacing it with the evaluation that "he has reached his maximum functioning level within Unit R [the mental retardation unit] and now needs further services in a more normal setting to develop his capabilities." The staff changed Thomas's diagnosis from mild retardation to "adjustment Disorder with Mixed Emotional Features" and noted that "Tom is extremely

aware that he is living with mentally retarded individuals and often voices his thoughts of not wanting to be around 'those retarded people.' We feel this is a normal and healthy reaction to being housed in this situation." The staff reiterated its view that institutional placement was not right for him. "The team feels Tom has received maximum benefit from training and counseling in the institutional setting and is now ready for community placement. Tom no longer requires custodial care in an institutional level, and continued provision of this would be inappropriate." The staff made three recommendations for Tom's residential placement:

> The desired placement for him would seem to be an adult foster care situation in which he would live in a family home with parents who could provide the love and caring and structure that Tom needs to complete the maturation process toward adulthood. He will need Adult Basic Education classes several hours a day and vocational training classes to prepare him for competitive employment. Tom needs assertiveness training to improve his self-concept. This could be possibly accomplished through a three-week course at the Outward Bound School.
>
> A second choice of the team for placement would be a group home for normal adults with a structured environment consisting of the education classes, work skills training, and somewhat structured leisure time. A third choice of placement would be a family care home providing similar services.

Thomas was released from Broughton on March 3, 1983.[2] For the next nine months he lived with a foster family in Cleveland County. According to his guardian,

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[2]This release was pursuant to the consent decree mentioned in Part II, *infra*.

> [Thomas] functioned as a family member, performing household chores, shopping, and personal care tasks. He completed an internship in training as a nursing home attendant. He participated in karate classes, the Boys Club, and other community activities. He developed friends in the community outside of his foster home.
>
> Tom maintained himself in good physical condition, improved his general appearance through increased grooming and improved clothing, and maintained his weight loss.

Thomas became upset, however, upon being required to have a roommate and upon meeting members of his biological family. Thomas announced his decision to live with his sister, who did not agree to the plan. Thomas then decided to leave the foster home, and a magistrate committed him to Broughton Hospital.

After two weeks at Broughton, he was placed in the McCay group home for developmentally disabled adults in Morganton, where he remained for about five months. He became upset with his roommate and moved out to the home's two-car garage. He also ran away several times and requested the Burke County department of social services to investigate his living situation.

On May 19, 1984, Thomas was placed at a rest home in Wilkes County that housed elderly and emotionally ill adults. Day treatment was available to him at a center several miles from the rest home. Thomas remained at the rest home for three months. In August 1984 he was moved to the Gaston County detoxification and night care facility, where he was living at the time of the district court's entry of final judgment on December 7, 1984.

II

On July 7, 1982, four months after Thomas's second commitment to Broughton Hospital, Thomas S. by his next friend brought this suit against Sarah Morrow, Secretary of the North Carolina department of human resources; Allen Childress, in his official capacity as Thomas's guardian; and the directors of two local agencies, the Gaston County department of social services and the Gaston-Lincoln area mental health program. An amended complaint joined as additional defendants the Gaston County commissioners.

The complaint alleged that the defendants had denied Thomas substantive due process accorded by the fourteenth amendment. It protested the defendants' failure to provide minimally adequate treatment, alleging that Thomas's hospitalization imposed a degree of restraint on his liberty inconsistent with professional judgment concerning his appropriate treatment. It also charged that the defendants had deprived him of liberty interests created by state law. Thomas requested an injunction ordering the defendants to place him in an appropriate group home and to provide other treatment recommended by the professionals who had examined and worked with him.

On May 26, 1983, the court entered a consent order permitting the two local agencies named as defendants to contract with an independent nonprofit organization for foster care and treatment from the date of Thomas's discharge from Broughton until March 1, 1984. Because of the consent order, the court deferred all parties' motions for summary judgment and declared the case inactive until February 1, 1984.

Upon reactivating the case and considerig further motions, the district court on September 18, 1984, ruled on cross motions for summary judgment. The court dismissed all pendent state law claims against state officials, in

accordance with Pennhurst State School and Hospital v. Halderman, 104 S. Ct. 900 (1984). The court also dismissed without prejudice the claims against the local officials. It granted summary judgment against the Secretary of the department of human resources and Thomas's guardian.

On December 7, 1984, the court entered a judgment requiring the Secretary and the guardian to develop a treatment plan and appoint a case manager for Thomas. It directed them to furnish Thomas the treatment recommended by the qualified professionals who had evaluated his needs. In accordance with the recommendations, the order specified that Thomas should be placed in a "stable suitable supervised community residential placement such as: (1) a non-institutional specialized adult foster care situation ... or (2) a group home with adults of average intelligence." Adhering to the recommendations, the court also directed that Thomas should be provided nonresidential services such as mental health counseling, adult basic education and vocational training, and "opportunities for community interaction." The Secretary and the guardian appealed.

III

The Secretary contends that she has not violated Thomas's "fourteenth amendment right to liberty of movement and freedom from restraint." She advances several reasons for reversing the district court's order. She asserts that *Youngberg* is inapplicable because Thomas, in her words, "lives in the community and is not subject to the control of the state," and because in any event he has received minimally adequate treatment consistent with professional judgment. She also contends that, because Thomas is not in a state institution, North Carolina law places responsibility for him on local authorities and not on her department. Finally, she says that the district court erred in granting summary judgment because the record disclosed genuine issues of material fact.

There are, of course, differences between *Youngberg* and Thomas's case. In *Youngberg* the court dealt with a claim for damages against state officials for breach of constitutional rights. 457 U.S. at 311. Thomas does not sue for money; he seeks only the treatment that professionals at a state hospital have prescribed. But this distinction between the cases does not militate against Thomas. The principles undergirding the Court's decision in the action for damages afford a sound foundation for the exercise of equitable powers to fashion remedial, prospective relief. *See* Scott v. Plante, 691 F.2d 634, 637 (3d Cir. 1982). Much of *Youngberg* necessarily addresses the situation of a single patient confined to an institution, but the Court did not intend the liberty interests it identified to be limited to these circumstances. The liberty interests protected in *Youngberg* did not arise because of the institutional confinement. Rather, the Court's premise was that involuntary commitment and other lawful confinement "do not extinguish" pre-existing liberty interests in safety and freedom from bodily restraint. 457 U.S. at 315.

Although during the course of this litigation Thomas's lodging has changed from a state hospital to a night care unit at a detoxification center, his status has not changed. He remains a legally incompetent adult who is a ward of a guardian appointed by the state. He did not choose to live at the detoxification center, and he is neither an alcoholic nor a drug addict. *Youngberg* does not suggest that an incompetent person sheds the basic liberty interests that the Court identified when state officials and his guardian move him from one facility to another.

In *Youngberg*, the Court recognized that it is not feasible to specify the type of training for every case. Nevertheless, it explained principles that are broad enough to govern diverse factual situations. With respect to a state's duty to provide training, the Court said: "The basic requirement of adequacy ... may be stated as that training which is

reasonable in light of identifiable liberty interests and the circumstances of the case." The Court coupled this definition with the admonition to "identify a constitutional predicate for the imposition of any affirmative duty on a State." 457 U.S. at 319 n.25. Moreover, the Court emphasized that in determing what is reasonable "in any case presenting a claim for training by a State ... courts must show deference to the judgment exercised by a qualified professional." 457 U.S. at 322.

The district court followed *Youngberg's* precepts. It identified as a constitutional predicate to its decree Thomas's liberty interests in safety and freedom from undue restraint. In fashioning a remedy, it relied on the recommendations of the state's professionals at Broughton Hospital. The district court did not err in finding that treatment and training based on the recommendations were reasonable in light of Thomas's liberty interests and the circumstances of the case. Tom's safety was threatened by his aggressiveness and his attempted suicide. These problems were fully documented and well known to the team of professionals who evaluated him and prescribed corrective treatment. With respect to Thomas's interest in freedom from undue restraint, the professionals at Broughton noted: "Maximum of invivo [sic] exposure to the community is essential (night hospitalization and full time day involvement in the local community could be considered as one possibility to start with)." Their recommended treatment included transfer from the hospital to a group home in the community.

The Secretary's assertion that Thomas has received minimally adequate treatment consistent with professional judgment is not supported by the record. Although the professional team at Broughton suggested that night hospitalization could be considered a possibility to start Thomas's treatment, the night care unit at the detoxification center is designed for persons "able to respond to short

term night care for 7-14 days." Thomas was lodged there for months. No professional has taken the position that lodging him in a night care unit operated in conjunction with a detoxification center is compatible with the treatment prescribed for him. Assignment to this lodging appears to have been based on expediency and a decision to save money.

Youngberg points out that lack of funds is an absolute defense to an action for damages brought against a professional in his individual capacity. 457 U.S. at 323. But the Court did not apply this precept to prospective injunctive relief. Instead, the Court explained that qualified professionals, to whom the courts owe deference, may consider the burden on the state when they prescribe treatment. 457 U.S. at 322 and n.29. The Court did not allow the professionals free rein, however. A decision about treatment made by a professional is presumed valid, but a court may reject it when it "is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." 457 U.S. at 323.

There is no evidence that the evaluation team at Broughton who prescribed Thomas's treatment did not take costs into consideration. One cannot assume that the qualified professionals drafted prohibitively expensive recommendations. The presumption of validity accorded the professionals' decision about appropriate treatment has not been rebutted. Consequently, in the absence of evidence that the decision is a "substantial departure from accepted professional judgment, practice, or standards," the district court was required to accept the recommendations of the qualified professionals at Broughton. *See* 457 U.S. at 323.

Society for Goodwill to Retarded Children, Inc. v. Cuomo, 737 F.2d 1239 (2d Cir. 1984), and Phillips v. Thompson, 715 F.2d 365 (7th Cir. 1983), on which the Secretary relies, do not counsel that Thomas be denied relief. As the Secretary emphasizes, these cases stand for the proposition that there is no right to placement in the community. But neither of these cases involved a professional's judgment concerning the appropriate treatment for a specific individual. In *Society for Goodwill* the district court's order that 400 mentally retarded patients be placed in the community by 1987 was reversed. In *Phillips* the district court's refusal to place a class of several hundred mentally retarded adults in the community was affirmed. Thus, these decisions do not apply to the facts in Thomas's case, in which a discrete recommendation for treatment was made by qualified professionals to meet the needs of an individual, as contemplated by *Youngberg*, 457 U.S. at 319 n.25.

The Secretary argues that North Carolina law makes local mental health authorities responsible for Thomas's treatment in the community. The local authorities asserted that the state, acting through the department of human resources, is responsible.

By statutory definition, the Secretary's department is "[t]he unit of State government authorized to implement, administer, and monitor community-based programs in cooperation with local governmental authorities . . . ." N.C. Gen. Stat. §122-35.36(6). This and related statutes justify the district court's ruling that the state, acting through the Secretary, was responsible and that the Secretary at her election could provide the required treatment through local authorities. The district court's understanding of the relationship between the Secretary and local authorities is supported by Vaughn v. North Carolina Department of Human Resources, 296 N.C. 683, 252 S.E 2d 792 (1979). *Vaughn* holds that within the

meaning of the Tort Claims Act a county director of social services and his staff act as agents of the state department of human resources with respect to the placement of children in foster homes. *Accord* Milner v. Trend Community Mental Health Services, Docket TA 7353 (N.C. Indus. Comm'n Nov. 10, 1981), *aff'd* (N.C. Indus. Comm'n July 28, 1982) (for purposes of Tort Claims Act, doctors employed by local mental health authority are agents of department of human resources).

Finally, we reject the Secretary's claim that genuine issues of material fact preclude summary judgment. Although the evidence presented in Thomas's behalf is voluminous, the district court did not rest on it. Instead, the court based summary judgment on the report and recommendation of the Secretary's professionals at Broughton Hospital, which were introduced into evidence by the Secretary. The guardian, through his counsel, also acknowledged:

> What Tom needs is as follows:
>
> a. A room to stay in, to meet his needs for privacy, within a supervised home with resident managers;
> b. Provision of meals at scheduled times;
> c. Developmental skills training, in self care and housekeeping as needed;
> d. Outside program resources, as needed:
>
> i. Vocational training
> ii. Psychosocial rehabilitation
> iii. Adult basic education
> iv. Individual therapeutic counselling
> v. Supportive/behavioral counselling and
> vi. Case management.
>
> This represents a consensus of those involved in Tom's treatment for the past 1-½ years. If his

> needs are many, we point out that substituting for twenty years of no family and little or no treatment is not an easy thing.

The remedy ordered by the court responds to these needs. There is no genuine issue of material fact about them or about the recommendations on which the order is based.

In sum, we find in the record no warrant for reversing the district court's order granting summary judgment and requiring implementation of the treatment and training prescribed by qualified professionals at Broughton Hospital.

IV.

The district court directed both the guardian and the Secretary to furnish Thomas specific treatment based on the recommendation of qualified professionals. The court also directed the guardian to "exercise his duties and responsibilities to the full extent required by N.C. Gen. Stat. § 35-1.34 and in a manner not inconsistent with the judgment." It absolved the guardian from personal responsibility for providing funds or resources for the treatment that it ordered.

The guardian assigns error to the district court's order on three grounds. He contends that the court lacks jurisdiction over him on the basis of 42 U.S.C. § 1983, because he has not acted under color of state law and because his actions cannot be attributed to the state. He argues that because he is a fiduciary, not a care giver, he is not subject to the requirments of *Youngberg*. Finally, he asserts that the eleventh amendment deprives the court of jurisdiction to instruct the guardian on the performance of his duties prescribed by state law. The guardian does not assign error to any of the specific provisions pertaining to

the treatment ordered by the court. Indeed, throughout this litigation the guardian has tried to secure for Thomas the treatment recommended by the professionals.

We find that jurisdiction over the guardian is proper under 42 U.S.C § 1983. In Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982), the Court explained that "conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State." The Court then outlined a two-part test for determining whether a defendant's acts may be attributed to the state. The first component of the test, the "under color of state law" requirement of § 1983, is satisified if the deprivation is "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." 457 U.S. at 937.

In this case the guardian's authority over Thomas is a "right or privilege created by the State." By statute, "[t]he essential purpose of guardianship is to replace an individual's authority to make decisions with the authority of a guardian when the individual does not have adequate capacity to make such decisions." N.C. Gen. Stat. § 35-1.6(3). A panoply of provisions empowers the guardian to implement this broad legislative purpose. Among the guardian's powers are the authority to establish his ward's domicile and to provide for his training and treatment. N.C. Gen. Stat. § 35-1.34(a)(1) and (a)(2). North Carolina law also authorizes the guardian to "give any consent or approval that may be necessary to enable the ward to receive medical, legal, psychological, or other professional care, counsel, treatment, or service." N.C. Gen. State. § 35-1.34(a)(4). Exercising his authority to make decisions for Thomas, the guardian arranged that Thomas be placed at Broughton Hospital and agreed to the temporary continuation of the commitment.

The guardian's reliance on Polk County v. Dodson, 454 U.S. 312 (1981), is misplaced. In *Polk County* the Court held that a public defender does not act under color of state law within the meaning of § 1983. Nevertheless, as the Court in *Polk County* pointed out, one who performs a custodial function pursuant to state law falls within the scope of § 1983. *See* 454 U.S. at 320. There can be no doubt that the guardian has custody of his ward, Thomas. N.C. Gen. Stat. § 35-1.34(a)(1).

The second component of the *Lugar* test of a cause of action under § 1983 inquires whether the defendant "may fairly be said to be a state actor." 457 U.S. at 937. In this case the guardian is properly characterized as a state actor because "he has acted together with or has obtained significant aid from state officials. . . ." 457 U.S. at 937. Working with the state hospital and with officials from local agencies, the guardian had Thomas admitted to Broughton Hospital and to succeeding placements. In *Lugar* the Court recognized that "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." 457 U.S. at 941, *citing* Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970). The actions of the guardian in joining with state officials to have Thomas moved from place to place irrespective of Thomas's will are legally indistinguishable from the seizure challenged in *Lugar*.

The guardina relies in part on Parham v. J.R., 442 U.S. 584 (1979), as authority for the proposition that a guardian appointed by the state is not a state actor for purposes of 42 U.S.C. § 1983. In *Parham* the Court ruled that the procedural due process required by the fourteenth amendment was the same when either a parent or a guardian sought to admit a child to a state mental hospital.

The guardian contends that his ruling and the reasoning underlying it establish that the guardianship is associated with the interests of the ward and is identified with parental rather than state control.

We cannot accept the argument that *Parham* requires dismissal of the guardian. In the first place, the question of the guardian's status as a state actor for the purpose of § 1983 was not before the Court in *Parham*. In the second place, the Court observed that there may be a difference in procedures required for reviewing a ward's need for continuing care as compared with the procedures required to review a similar need of a child with natural parents. The Court acknowledged the risk that a child without natural parents may be "lost in the shuffle." 442 U.S. at 619. It noted that the ward's commitment to the institution may have been prolonged because his guardian had difficulty finding a foster home. This situation is quite similar to the one that confronts Thomas. Rather than dismissing the guardian, as Thomas's guardian asks us to do, the *Parham* Court remanded the case for consideration of the issue of whether wards of the state should be treated differently from children with natural parents with respect to their long-term placement.

We conclude that the guardian acted under color of state law and that he is a state actor for purposes of jurisdiction under § 1983. Moreover, the guardian was properly joined under Rule of Civil Procedure 19. The powers of the guardian are so pervasive that in his absence complete relief cannot be afforded Thomas. The guardian is subject to service of process and his joinder will not deprive the court of jurisdiction over the subject matter of the action.

The guardian argues further that "a defendant whose responsibility to plaintiff does not derive from direct provision of care cannot be brought to task under *Youngberg*." The guardian points out that he was

appointed under a state law requiring that a "disinterested public agent" serve as guardian of an incompetent when no private individual or corporation can be found who is willing to serve. N.C. Gen. Stat. § 35-1.29. By law, the "disinterested public agent" must be "an adult officer, agent, or employee of a State human resources agency who has no immediate responsibilities for providing services to a ward. . . ." N.C. Gen. Stat. § 35-1.7(4).

Nevertheless, the guardian's responsibilities cannot be distinguished from those of the defendants in *Youngberg* on the ground that the guardian has no immediate responsibility for providing services to his ward. The defendants in *Youngberg* were the administrators of the state hospital to which the respondent had been committed. 457 U.S. at 310 n.3. They had custody of the patient and were responsible for making decisions concerning his treatment and training. Similarly, the guardian has legal custody of Thomas and is responsible for making decisions concerning his treatment. We agree with the guardian, however, that Pennhurst State School and Hospital v. Halderman, 104 S. Ct. 900 (1984), precludes a federal court from directing a state official to perform the duties imposed on him by state law. Consequently, on remand the district court should delete from its order the direction to the guardian pertaining to the exercise of his duties under state law. This modificaiton of the decree does not relieve the guardian from all responsibility with respect to the relief the district court ordered. He must, as the district court required, exercise his authority over Thomas in a manner not inconsistent with the court's judgment. This obligation remains as a matter of federal law. He cannot act under color of state law to infringe the liberty interests secured by the fourteenth amendment that are the subject of this litigation.

The judgment entered against the Secretary is affirmed. The judgment entered against the guardian is affirmed, subject to modification consistent with this opinion. The case is remanded to the district court.

APPENDIX B

UNITED STATE COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 84-2254

Thomas S., Joyce M. Brooks,
appt'd guardian *ad litem,*

Appellee,

versus
Sarah T. Morrow, etc.,

Appellant,

and
Allen Childress, etc., et al,

Defendants.

N. 84-2255

Thomas S. Joyce M. Brooks,
appt'd guardian *ad litem*,

Appellee,

versus
Allen Childress, etc.,

Appellant,

and
Sarah T. Morrow, etc., et al,

Defendants.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte.
James B. McMillan, District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter for a panel consisting of Chief Judge Winter, Judge Hall, and Judge Butzner.

For the Court,

/s/ John M. Greacen
CLERK

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 84-2254

Thomas S., etc.,

Appellee,

versus
Sarah T. Morrow, etc.,

Appellant,

and
Allen Childress, etc., et al,

Defendants.

No. 84-2255

Thomas S., etc.,

Appellee,

versus
Allen Childress, etc.,

Appellant,

and
Sarah T. Morrow, etc., et al,

Defendants.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte.
James B. McMillan, District Judge

Upon consideration of appellant Sarah T. Morrow's motion for stay of mandate pending application to the United States Supreme Court for writ of certiorari,

IT IS ORDERED that the motion is denied.

For the Court—By Direction

/s/ John M. Greacen
CLERK

APPENDIX D

IN THE DISTRICT COURT OF
THE UNITED STATES
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
Charlotte Division
C-C-82-418-M

THOMAS S., by his next friend,
Joyce Brooks,

Plaintiff,

-vs-

SARAH MORROW, Secretary, North Carolina Department of Human Resources; ALLEN CHILDRESS, in his official capacity as guardian for the plaintiff; BENJAMIN CARPENTER, Director, Gaston County Department of Social Services; JAMES MELTON, Director, Gaston-Lincoln Area Mental Health Program; HARLEY B. GASTON, JR., DAVID BEAM, DAVID HOLLIFIELD, JAMES FORRESTER, DEAN CARPENTER, ROBERT HEAVNER, and PORTER McATEER, in their official capacity as Gaston County Commissioners,

Defendants.

Edward G. Connette, Post Office Box 36726, Charlotte, North Carolina 28236; Roger Manus, Carolina Legal Assistance for Mental Health, Post Office Box 2446, Raleigh, North Carolina 27611; and Theodore O. Fillette, Legal Services of Southern Piedmont, Inc., 951 South Independence Boulevard, Suite 600, Charlotte, North Carolina 28202, counsel for plaintiff.

Wilson Hayman, Assistant Attorney General; Reginald L. Watkins, Assistant Attorney General; William F. O'Connell, Special Deputy Attorney General; Walter M. Smith, Associate Attorney, North Carolina Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602; Catherine C. Stevens, Post Office Box 1578, Gastonia, North Carolina 28052; R. T. Wilder, Jr., Mullen, Holland & Cooper, 316 South Marietta Street, Post Office Box 488, Gastonia, North Carolina 28052; Jeff Trepel, Post Office Box 995, Gastonia, North Carolina 28052; and Robert H. Gage, Cox & Gage, 305 College Street, Morganton, North Carolina 28655, counsel for defendants.

Before James B. McMillan, District Judge

I.

Paul Caldwell, next friend of plaintiff Thomas S., filed this suit on July 7, 1982, seeking declaratory and injunctive relief for Thomas S. under federal and state law. Paul Caldwell later became employed by defendants, and Joyce Brooks now serves as next friend.

Thomas S., a twenty-year-old Gaston County resident, has been diagnosed as suffering from, *inter alia,* schizophrenia and borderline mental retardation, and is incapable of either living independently or managing his own affairs. Given up for adoption at birth, Tom spent his first eighteen years in approximately forty different foster homes and institutions while in the custody of the Gaston County Department of Social Services (DSS). DSS shuffled Tom through so many placements during his youth (*see* deposition of Dannette Rosenberg, pp. 10-15) because there were no appropriate community-based treatment facilities available in Gaston County during this period (defendant Morrow's answer, ¶ 17; defendant Carpenter's answer, ¶13).

Soon after Tom's eighteenth birthday, DSS succeeded in having Tom declared legally incompetent, and defendant Allen Childress, Regional Adult Mental Health Specialist of the Department of Human Resources (DHR), Division of Mental Health, Mental Retardation, and Substance Abuse Services, was thereafter appointed guardian under the authority of N.C.G.S. §§122-24.1 and 35-1.28. Because Childress considered Tom's then-current placement inappropriate, Childress caused Tom to be admitted to the "R" (mental retardation) unit at Broughton Hospital on March 15, 1982.

Four months after Tom was institutionalized at Broughton, his next friend brought this suit against state and local officials seeking judicial declaration that Tom's rights under the United States Constitution and under state law had been denied by defendants, and seeking prospective injunctive relief to remedy the alleged wrong. The complaint alleged that, under federal and state law, Tom is entitled to more appropriate treatment of his condition in a less restrictive, community-based setting. On May 26, 1983, plaintiff and two of the local defendants agreed to a special treatment plan funded by those defendants which provided appropriate community-based treatment for Tom until March 1, 1984. That agreement was incorporated into a judgment, and, because of that judgment, the court deferred ruling on all parties' motions for summary judgment. The court designated the case as inactive until February 1, 1984. Since the consent judgment was filed, Tom has been shifted to at least three additional placements. He is now being housed in the Gaston County detoxification facility because there is no place else for him to go. Letter from plaintiff's counsel, Edward G. Connette (filed August 29, 1984).

Meanwhile, the parties, and others, have filed a number of additional motions. All parties have renewed their motions for summary judgment. Other mentally impaired persons have moved that they be allowed to intervene, and have joined plaintiff in a motion to amend the complaint and to certify a class. The local defendants have moved that, in the event a statewide class is certified, all claims against the local defendants be severed from the class action case.

On August 15, 1984, the court heard argument on those motions.

II.

All pendent state law claims should be dismissed. *Pennhurst State School & Hospital v. Halderman,* 52 U.S.L.W. 4155 (January 23, 1984), is dispositive of those claims. *Pennhurst* held that the Eleventh Amendment prohibits federal courts from adjudicating pendent claims against state officials based on those officials' alleged violations of state law.

Also in *Pennhurst,* however, the Supreme Court reaffirmed the established principle that federal courts do have jurisdiction to grant relief against state officials based on those officials' alleged violations of federal law. *Id.,* at 4160; *Ex parte Young,* 209 U.S. 123 (1908). "[I]n such cases this Court is vested with the constitutional duty to vindicate 'the supreme authority of the United States' ...." *Pennhurst,* at 4160, fn. 17.

III.

Plaintiff is entitled to summary judgment based on his constitutional claims against defendants.

A

Plaintiff claims that his liberty—a substantive right arising solely under the Fourteenth Amendment to the Constitution—has been denied by the defendants. The seminal case on this "substantive due process" claim is *Youngberg v. Romeo,* 457 U.S. 307 (1982). *Youngberg* discussed "the substantive rights of involuntarily committed mentally retarded persons under the Fourteenth Amendment to the Constitution." *Id.,* at 314.

Although *Youngberg* discussed the constitutional rights of a severely retarded, institutionalized individual, the standards outlined in that case are appropriate to this case. The parties are in dispute about whether Tom is mentally retarded, but they agree that he suffers from mental impairments which prevent him from living independently and which necessitated the appointment of a guardian. Tom is not now institutionalized, but he was so placed at the time the suit was filed, and, as a ward of the state, Tom at any time may be required to return to Broughton, if his guardian so directs. Therefore, Tom is like the plaintiff in *Youngberg* insofar as the state has control over Tom's liberty and care.

The holding in *Youngberg* dictates that defendants Morrow and Childress are responsible for ensuring that plaintiff retains the liberty to which he is entitled solely under the Fourteenth Amendment. Defendant Childress, regional specialist for DHR, was plaintiff's guardian and caused plaintiff to be admitted to Broughton on March 15, 1982. Defendant Morrow is Secretary of DHR and is

responsible for the administration of DHR as well as the supervision of county deparments of social services.

Morrow and Childress, like the institution officials in *Youngberg,* are responsible for the legitimate restraints on plaintiff's liberty resulting from plaintiff's mental incompetency and wardship; also like the defendants in *Youngberg,* Morrow and Childress are charged with the responsibility that these legitimate restraints are no more restrictive than necessary.

Liberty interests protected by the Fourteenth Amendment include safety, liberty from bodily restraint, and "minimally adequate or reasonable training to ensure safety and freedom from undue restraint." *Id.* at 319.

The training to which plaintiff is entitled under the Fourteenth Amendment is that which is "reasonable" in light of the "balance [between] 'the liberty of the individual' and 'the demands of an organized society.'" *Id.* at 320. "In determining what is 'reasonable'—in this and in any case presenting a claim for training by a State—we emphasize that courts must show deference to the judgment exercised by a qualified professional." *Id.* at 322.

> The decision [to treat a certain way], if made by a professional, is presumptively valid; liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.

Id. at 323. This court, therefore, in determining the training or treatment to which plaintiff is entitled under the Fourteenth Amendment, must look for guidance to the professional judgment and decisions of those who examined and treated him.

Defendants recently have been filing affidavits asserting, at least in part, that plaintiff has a behavioral problem which makes it difficult to treat him. *See, e.g.*, affidavit of James B. McKelvey, dated August 30, 1984; affidavit of Rudy Cannon, dated August 27, 1984. The court fails to see how that fact can excuse defendants from providing the treatment to which plaintiff is entitled. People with problems are rarely easy to deal with. If plaintiff were "normal," then he would not need the treatment the professionals say he needs. The solution to whatever behavioral problems plaintiff may have is *not* to place him inappropriately in a detoxification facility; it is to provide him with appropriate treatment.

The overwhelming weight of professional opinion concerning the appropriate treatment needs of Thomas S. appears to be consistent with the recommendations formulated by the R Unit treatment team as set forth in the psychological evaluation dated November 22, 1982, and signed by Staff Psychologist William R. Wellborn, III:

RECOMMENDATIONS

1. Placement in a group home with adults of average intelligence without severe emotional difficulties (stable environment with structure)

2. Counseling by both male and female therapists regarding conflicts in establishing relationships with both men and women

3. Needs exposure to many social situations outside of the institutional environment (e.g. shopping, dining out, short trips, etc.)

4. Attend an Outward Bound Course (21-day course) to help develop his ego, strength, and self-concept

5. Placement in an environment that will allow the perfect balance between supervision and freedom so that Tom will not feel rejected

6. Training in mathematics and money management

7. Training in a specific trade like auto mechanics so that Tom will more likely be able to support himself in the future

Defendant Morrow's *Memorandum in Support of Motion to Dismiss, or Alternatively, Motion for Judgment on the Pleadings or, Alternatively, Motion for Summary Judgment,* Exhibit 7, page 9 (March 31, 1983). Details of the recommended appropriate treatment vary according to the professional making the assessment, but the basic, common elements appear to be:

1. A stable environment — i.e., a relatively permanent placement.

2. A non-institutional adult foster care situation which would allow Tom to function as a family member with some supervision but with relatively few restrictions.

3. Basic educational training and vocational training.

4. Therapy and counseling.

See, e.g., Affidavit of Rudy Cannon (filed August 30, 1984).

Defendants have filed a large number of affidavits which, defendants claim, show that the haphazard, inconsistent

treatment provided for plaintiff was consistent with the recommendations of professionals. *See, e.g.,* affidavits attached to defendant Morrow's *Memorandum in Support of Motion to Dismiss, or Alternatively, Motion for Judgment on the Pleadings or, Alternatively, Motion for Summary Judgment* (filed March 31, 1983). However, scrutiny of those affidavits, coupled with an examination of the deposition excerpts and affidavits submitted by plaintiff, shows that most of the treatment provided for plaintiff was not consistent with that recommended by the professionals. *See, e.g.,* affidavits of Paul Caldwell, Dr. Jacelyn Wedell-Monnig, Dr. Carolyn Schroeder and depositions of Allen Childress (pp. 11-12, 37-39, 93) and Benjamin Carpenter (p. 12) (filed May 6, 1983). To the extent that any professionally prescribed treatment differed from that set forth above, it differed because the professional's stated judgment was modified to conform to the *available* treatment, rather than to the *appropriate* treatment, for plaintiff's condition.

Lack of funding or of established alternatives is not a factor which may be considered in determining the scope of this constitutional right. Of course, that factor is critical in determining whether *damages* may be recovered by one who was denied his right to appropriate treatment.

> In an action for damages against a professional in his individual capacity, however, the professional will not be liable if he was unable to satisfy his normal professional standards because of budgetary constraints; in such a situation, good-faith immunity would bar liability.

Youngberg, at 323. Just as certainly, however, consideration of budgetary constraints is not proper when *defining* this constitutional right. To the extent that a professional's judgment of the appropriate treatment is shown to have been modified to fit what is available, that judgment likely

has become "a substantial departure from accepted professional judgment, practice, or standards." The Supreme Court in *Youngberg* recognized that "normal professional standards" (or professional judgment) and "budgetary constraints" are separate concepts ("the professional will not be liable if he was *unable to satisfy his normal professional standards because of budgetary constraints" Id.,* at 323 [emphasis added]).

Nor are budgetary constraints restrictive of a court's equitable authority and power in fashioning prospective relief after determining that this constitutional right has been violated. *See, e.g., Wyatt v. Stickney*, 344 F.Supp. 387, 394 (M.D.Ala. 1972), *affirmed in part*, remanded in part and decision reserved in part sub nom. *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974). *Accord, Scott v. Plante*, 691 F.2d 634, 637 (3d Cir. 1982):

> Obviously the problem of hindsight interference with decisions made by hard-pressed professional staff members of state mental institutions is a more serious one than that of assisting them in directing prospective injunctive relief against appropriate state officials. *See Edelman v. Jordan*, 415 U.S. 651, 667, 94 S.Ct. 1347, 1357, 39 L.Ed.2d 662 (1974).

For the foregoing reasons, the court concludes that defendants Morrow and Childress have denied and continue to deny plaintiff his rights under the Fourteenth Amendment. Plaintiff is entitled to treatment recommended by qualified professionals whose judgment is unsullied by consideration of the fact that the state does not now provide appropriate treatment or funding for appropriate treatment.

Plaintiff is therefore entitled to prospective injunctive relief.

B

Plaintiff also claims his state-created liberty interests — i.e., those conferred on plaintiff by North Carolina law — were taken from him by defendants without due process of law, and, thus, in violation of his rights under the Fourteenth Amendment to the Constitution. In particular, plaintiff claims that the North Carolina General Statutes, §§ 35-1.6 *et seq.*, (the North Carolina Guardianship Act); § 122-55.8, (the Continuity of Care Statute); § 143B-137; and § 168-1 create liberty interests which may not be deprived without due process of law. In support of this "procedural due process" claim, plaintiff cites *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); *Vitek v. Jones*, 445 U.S. 480, 488, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552 (1980); and *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7, 99 S.Ct. 2100, 2103, 60 L.Ed.2d 668 (1979). (State-created liberty interests, like federally derived constitutional rights, trigger the procedural protections of the Fourteenth Amendment.)

Defendants assert that this claim is foreclosed by *Pennhurst State School & Hospital v. Halderman, supra. Pennhurst,* however, does not go so far. *Pennhurst* held only that federal courts may not exercise pendent jurisdiction to adjudicate claims of state law violations against state officials. A "procedural due process" claim is an entirely different sort of action. The role of state law in this constitutional claim is merely to *define* the liberty interest at stake. In order to prevail, plaintiff must show that his *procedural* rights *under the Constitution* were not provided when the state took away plaintiff's state-created right to a particular form of liberty. Such a suit, then, is not an enforcement of state law, but an enforcement of federal constitutional law. As the Court said in *Pennhurst*, "[I]n such cases this Court is vested with the constitutional duty to vindicate 'the supreme authority of the United States' ...." *Pennhurst*, 52 U.S.L.W. at 4160, fn. 17.

Plaintiff argues that this cause of action entitles him to the same prospective relief afforded under his "substantive due process" claim, since the "professional judgment" of those who have treated plaintiff is that he should be placed in a less-restrictive, community setting with enriching treatment. Defendants deny that many of the statutes even apply to plaintiff. They also say that, even if the statutes apply, plaintiff is not entitled to relief.

Since the court already has determined that plaintiff is entitled to relief based on his rights derived solely from the Fourteenth Amendment, the court need not reach this second constitutional claim for relief asserted by plaintiff. The court recognizes that state *and* local defendants, rather than just defendants Morrow and Childress, would share responsibilities should plaintiff recover on his second constitutional claim. The court will not speculate, however, on who *might* be responsible when it is clear that Morrow and Childress *are* responsible on the basis of plaintiff's first constitutional claim.

For the reasons set forth above, IT IS THEREFORE ORDERED that:

1. The pendent state law claims are DISMISSED without prejudice.

2. Summary judgment for plaintiff Thomas S. is ALLOWED to the extent set forth above.

3. Counsel for plaintiff and defendants Morrow and Childress shall confer and attempt to propose, within ten (10) days, a judgment which includes a treatment program for Thomas S. based on "professional judgment" consistent with this order. Counsel should inform the court within that time frame whether they are able to reach an agreement.

4. The claims against defendants Benjamin Carpenter, Melton, Gaston, Beam, Hollifield, Forrester, Dean Carpenter, Heavner, and McAteer are DISMISSED without prejudice.

5. The court defers judgment on the issues of

(a) intervention of other plaintiffs,
(b) amendment of plaintiff's complaint, and
(c) certification of a class action

This 17 day of September, 1984.

James B. McMillan
United States District Judge

APPENDIX E

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division
C-C-82-418-M

THOMAS S., by his next friend,
Paul Caldwell,

Plaintiff,

-vs-

SARAH MORROW, Secretary, North Carolina Department of Human Resources; ALLEN CHILDRESS, in his official capacity as guardian for the plaintiff; BENJAMIN CARPENTER, Director, Gaston County Department of Social Services; JAMES MELTON, Director, Gaston-Lincoln Area Mental Health Program; HARLEY B. GASTON, JR., DAVID BEAM, DAVID HOLLIFIELD, JAMES FORRESTER, DEAN CARPENTER, ROBERT HEAVNER, and PORTER McATEER, in their official capacity as Gaston County Commissioners,

Defendants.

FINAL JUDGMENT

On September 18, 1984, this court entered an order holding, *inter alia,* that plaintiff is entitled to summary judgment for prospective injunctive relief against defendants Morrow and Childress. There being no genuine issues of material fact, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff Thomas S. is entitled to summary judgment as a matter of law.

Defendants are not required by this judgment to expend their own personal funds or resources.

Defendants are ORDERED to provide relief as follows:

1. A treatment plan to be developed within fourteen (14) days of entry of this judgment. The plan will contain specific behaviorally stated goals, objectives, plans, and time periods for meeting those goals and shall identify the staff involved with each objective. Copies of this written plan shall be filed with the court and with all counsel of record.

2. Defendants Morrow and Childress shall furnish plaintiff with the following treatment, based upon recommendations formulated by qualified professionals who are familiar with his treatment needs and acting within their respective areas of expertise relevant to the issue being considered. Treatment under the terms of this judgment may be provided by community service providers or through local government agencies.

> (a) Within thirty (30) days of the entry of this judgment, defendants Childress and Morrow shall agree upon and appoint a suitable case manager for Thomas S. This case manager will

have adequate time to meet the case management needs of Thomas S. He or she shall have responsibility for helping design the treatment plan; make the final selection of the residential placement, after consultation with plaintiff's guardian; train, monitor, and consult with care providers; arrange, assist with, and monitor his daily activities, educational, vocational, and his counseling placements; and decide when, within the limits specified in paragraph 2(c), those non-residential placements should begin. Defendant Morrow shall take reasonable measures to provide continuity and effectiveness of case manager services.

(b) As soon as possible, defendants shall locate a stable suitable supervised community residential placement such as: (1) a non-institutional specialized adult foster care situation which would allow Thomas S. to function as a family member with supervision but with few restrictions or (2) a group home with adults of average intelligence without severe emotional difficulties. The particular type of community residential placement chosen would be consistent with professional judgment and plaintiff's needs. It is recognized by professionals that the client's attitude toward a placement is crucial to its success in promoting minimal habilitation. Defendants shall arrange for suitable respite opportunity for Thomas S. as needed. Thomas S.'s residential placement is to be in an environment that will assure an appropriate balance between supervision and freedom. His treatment shall be geared toward an eventual short-term goal of supervised apartment living and toward eventual graduation to independent living. If qualified professionals with expertise in

providing the type of residential service to be delivered think that a back-up placement of the same type is appropriate, the back-up shall be afforded soon after the principal residential placement begins.

(c) The following nonresidential services shall be provided within thirty (30) days from the date of this judgment (provided that a placement may be delayed if justified by Thomas S.'s needs rather than an unavailability of services):

i. Immediately, plaintiff shall be given opportunities for exposure to social situations outside his placement, such as shopping trips, dining out, and other opportunities for community interaction on a frequent and regular basis.

ii. Within thirty (30) days plaintiff shall be offered appropriate mental health counseling and, in particular, appropriate counseling regarding his conflicts in establishing relationships with both men and women.

iii. Within sixty (60) days Thomas S. shall be offered appropriate vocational training to prepare him for a trade consistent with his needs and interests. If appropriate, the vocational training should be on-the-job training.

iv. Within six (6) months, Thomas S. should be offered appropriate adult basic educational opportunities. The educational setting and format shall be geared to Thomas S.'s individual needs and abilities.

3. Periodic evaluations of Thomas S. shall be conducted by the Division of Disorders of Development and Learning at the University of North Carolina at Chapel Hill to generate recommendations for his continuing treatment. If there is a change in the needs of Thomas S. or other circumstances warranting modification of this judgment, the parties shall confer and attempt in good faith to propose a modified judgment consistent with the changed treatment needs or other circumstances. Plaintiff's attorneys and agents shall be granted ready access to client records and other information concerning Thomas S.'s treatment needs. In fulfilling their monitoring functions, plaintiff's attorneys shall advise this court as to whether the terms of this judgment are being carried out and whether the treatment of Thomas S. otherwise reflects the exercise of accepted professional judgment.

4. Thomas S.'s treatment needs shall be formally re-evaluated by defendants at least every six (6) months following the date of the development of the treatment plan.

5. The treatment of Thomas S. shall be provided in a manner which promotes the independence and enhances the dignity of Thomas S. and is as consistent as possible with societal norms, in view of Thomas S.'s special needs.

6. Defendants and local community service providers who shall furnish Thomas S. with treatment under this judgment shall be guided by the decisions and opinions of qualified professionals involved with his treatment and acting within their respective areas of expertise in making the particular decisions at issue. Thomas S. shall be afforded minimally adequate treatment consistent with professional judgment designed to address his needs.

7. The guardian shall exercise his duties and responsibilities to the full extent required by N.C.G.S. § 35-1.34, and in a manner not inconsistent with this judgment. The guardian is not personally responsible for providing funds or resources for the care and treatment of Thomas S.

8. This judgment shall be binding upon defendants and their successors in office, their agents, and those to whom they have assigned or may assign any duties or responsibilities for the care and treatment of Thomas S.

This 7 day of December, 1984.

James B. McMillan
United States District Judge

APPENDIX F

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division
C-C-82-418-M

THOMAS S., by his next friend,
Paul Caldwell,

Plaintiff,

-vs-

SARAH MORROW, Secretary, North Carolina Department of Human Resources; ALLEN CHILDRESS, in his official capacity as guardian for the plaintiff; BENJAMIN CARPENTER, Director, Gaston County Department of Social Services; JAMES MELTON, Director, Gaston-Lincoln Area Mental Health Program; HARLEY B. GASTON, JR., DAVID BEAM, DAVID HOLLIFIELD, JAMES FORRESTER, DEAN CARPENTER, ROBERT HEAVNER, and PORTER McATEER, in their official capacity as Gaston County Commissioners,

Defendants.

ORDER CERTIFYING CLASS

On March 22, 1984, plaintiff Thomas S. moved the court for permission to proceed with this case as a class action. On April 17, 1984, he also requested permission to file a second amended complaint in order to allege class claims and to request class-wide relief.

Plaintiff has defined the class as "adults who are mentally retarded or who have been treated as mentally retarded and who are or will be inappropriately kept in public psychiatric institutions in North Carolina in conditions violative of their constitutional rights."

The court finds that plaintiff has met the requirements of Rule 23(a) and 23(b)(2) and that as a result, this case can be certified as a class action.

The court specifically finds that the class is too numerous for joinder of all class members to be practical. Although the number of class members is not known, it is apparent that the number that would be included is well over one hundred. *See Plaintiff's Synopsis of Evidence* (filed August 15, 1984).

There are common questions of law and fact between the named representatives and class members. The appropriateness of the state's treatment of mentally retarded patients is the central question of fact. While the specific needs of individuals may differ, the sufficiency of the state's treatment is the central, common factual issue. The legal duty of defendant Morrow to provide adequate treatment is the central legal question for Thomas S., the intervenors and class members.

The court finds that the claims of representative parties are typical of the claims of the class. Thomas S. and the intervenors complain of inadequate treatment at the state

psychiatric institutions as well as the lack of alternatives to confinement at these institutions. Thus, the named representatives' claims are typical of class members who seek either alternative community-based treatment or more appropriate treatment while remaining in the hospital.

Although Thomas S. is no longer at a state psychiatric institution, he still belongs to the class that he seeks to represent because he is in danger of returning to a state hospital. He was receiving appropriate treatment for a period during 1983-84, but he recently has been placed in a detoxification facility simply because there was no other place for him. He is in real danger of being transferred to a psychiatric hospital once again. Thus, he represents the class. Even if Thomas S.'s status did not make his claims typical of the class, the claims of the intervenors are representative of the class.

The court finds that the named plaintiffs will provide fair and adequate representation of the interests of the class. The representative parties will proceed with this action seeking relief for all class members. The proposed class complaint seeks class-wide relief for adults, not just for proper treatment of Thomas S. and the intervenors. The named representatives will represent the claims of the class as well as their own individual claims.

Therefore, Thomas S. and the intervenors have met the prerequisites for maintaining a class action pursuant to Rule 23(a).

The court also finds that this action is maintainable under Rule 23(b)(2). Defendant Morrow has acted or refused to act on grounds generally applicable to the class. Defendant Morrow is responsible for providing treatment for those mentally retarded adults in the state's care. The

state system that has been developed for treatment and the alleged deficiencies in the system are applicable to the entire class. Therefore, if the class prevails, final injunctive or declaratory relief would be appropriate.

Plaintiff has satisfied the requirements of Rules 23(a) and 23(b)(2). Therefore, the class will be certified subject to later modification by the court as provided for in Rule 23.

IT IS THEREFORE ORDERED that the class is certified pursuant to Rules 23(a) and 23(b)(2), subject to modification by the court.

This 7 day of December, 1984.

James B. McMillan
United States District Judge

APPENDIX G

IN THE DISTRICT COURT OF THE UNITED
STATE FOR THE WESTERN
DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-82-418-M

THOMAS S., by his next friend,
Paul Caldwell,

Plaintiff,

-vs-

SARAH MORROW, Secretary, North Carolina Department of Human Resources; ALLEN CHILDRESS, in his official capacity as guardian for the plaintiff; BENJAMIN CARPENTER, Director, Gaston County Department of Social Services; JAMES MELTON, Director, Gaston-Lincoln Area Mental Health Program; HARLEY B. GASTON, JR., DAVID BEAM, DAVID HOLLIFIELD, JAMES FORRESTER, DEAN CARPENTER, ROBERT HEAVNER, and PORTER McATEER, in their official capacity as Gaston County Commissioners,

Defendants.

ORDER GRANTING MOTION TO INTERVENE

On March 22, 1984, intervenors Mr. B., Mr. C., Ms. H., and Ms. R., by their guardian *ad litem* Cornelius Manly, moved the court for permission to intervene in this action as plaintiffs pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure. Memoranda of law on the intervention motion have been filed by several parties to the case.

The proposed intervenors seek to join in Thomas S.'s suit against defendants Childress and Morrow for the deprivation of his right to appropriate treatment while under the state's custody. On September 18, 1984, the court held on a summary judgment motion that Thomas S.'s inappropriate treatment had violated his constitutional rights.

In the intervenors' proposed complaint, they all allege that the state has failed to provide them with the treatment that has been recommended by qualified professionals. All of the intervenors allege to be mentally retarded or to be treated that way by defendant Morrow.

At the time of the motion to intervene, Mr. B. was living in the Lineberger Building at Dorothea Dix Hospital ("Dix Hospital"). In his proposed complaint, he alleged that he had not been placed in a community-based center despite recommendations by professionals that he be so placed. Before his admission to Lineberger, Mr. B. had been in a group home for mentally retarded adults (Stone House). On May 21, 1984, Mr. B. was placed in the Wake County Tutor Program, a community-based center that was a more appropriate placement than Lineberger.

Mr. C. is at Dix Hospital and has been transferred several times within divisions of the hospital. He alleges that although an evaluation team has recommended that

he receive vocational opportunities, positive reinforcements, practice in independent living skills, such treatment has not been provided to him at Dix Hospital.

Ms. H. has been at Dix Hospital since 1978 and has been transferred within the hospital several times. She is heavily medicated and alleges that she is kept at Dix because of the lack of community-based alternatives for treatment.

Ms. R. is currently at Broughton State Psychiatric Hospital and has been there since 1973. She resides in a locked ward. She alleges that she is not receiving treatment in a small normalizing community-based setting as recommended by professionals.

The applicants for intervention have moved for permission to intervene both as a matter of right (Rule 24(a)) and as permitted in the discretion of the court (Rule 24(b)). The court addresses only the request to intervene pursuant to Rule 24(b).

Under Rule 24(b), the court has discretion to allow timely intervention when the applicants' claims and the main action have a question of law or fact in common. Rule 24(b) directs the court to pay particular attention to undue delay or prejudice that would be caused by intervention.

The main question of law raised by the intervenors is the same as that raised by Thomas S. The significant legal question is what legal duty of treatment the state owes to mentally retarded adults placed in state institutions. Thomas S. has alleged a systemic failure of the state to provide adequate treatment to mentally retarded adults that are under the care of the state. The applicants for intervention allege to have been harmed by the same inadequate treatment.

While Thomas S. and the intervenors have distinct medical histories, their claims also share a common factual basis. The conditions at state psychiatric hospitals and other state facilities and the appropriateness of the treatment that they provide mentally retarded patients is the central factual question. The specific needs of Thomas S. and the intervenors may be different, but the claim of unprovided treatment is the same, especially the state's failure to provide community-based alternatives to the psychiatric hospitals.

The defendants argue that intervention is inappropriate in this case because it is not timely and creates prejudice.

The court has wide discretion in deciding on the timeliness of intervention. *Black v. Central Motor Lines, Inc.*, 500 F.2d 407, 408 (4th Cir. 1974). In judging the timeliness of intervention, the court should look primarily at prejudice to the parties or undue delay. *Spring Construction Co., Inc. v. Harris*, 614 F.2d 374 (4th Cir. 1980).

The court can see little, if any, prejudice to the defendants by allowing the intervention. They have been on notice of possible intervenors by the original allegations of a class-wide failure to provide adequate treatment. Such advance notice is significant in judging the prejudice of intervention. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393-95 (1977). It is more likely that the defendants would be prejudiced by a denial of intervention. If the court denies intervention, the defendants will probably face a new suit by the intervenors on the same legal question without the already developed record that exists in the Thomas S. litigation.

If anyone were prejudiced by the intervention, it would be Thomas S. himself. But the court has already ordered that the defendants propose a plan of adequate treatment

for Thomas S. The intervention will not delay the vindication of his constitutional right to appropriate treatment.

The court finds that the application for intervention is timely in this case. Although the complaint was filed on July 7, 1982, the case was on inactive status from June 10, 1983, until February 1, 1984. During this period, Thomas S. was receiving appropriate treatment as a result of an agreement of the parties. It was only after this appropriate treatment terminated that the litigation was resurrected. The motion to intervene was filed on March 22, 1984, shortly after the case became active once again.

The court finds that intervention is proper under rule 24(b) for intervenors Ms. R., Mr. C, and Ms. H. The court also finds that intervention is proper for Mr. B. even though he is currently in a community-based center in Wake County.

The record has already shown how often mentally retarded patients are shuffled from one center to another by the state. Mr. B. was in a group home previously before being transferred to Lineberger at Dix Hospital. He is in real danger of being transferred back to a state psychiatric hospital. He has an interest in having a *stable* community-based placement. For this reason, his intervention in this case is proper.

The court grants the motion of Mr. B., Mr. C., Ms. R., and Ms. H. to intervene in this suit. These intervenors are given leave to file intervenors' complaints.

IT IS SO ORDERED, this 7 day of December, 1984.

James B. McMillan
United States District Judge

APPENDIX H

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division
C-C-82-418-M

THOMAS S., by his next friend,
Paul Caldwell,

Plaintiff,

-vs-

SARAH MORROW, Secretary, North Carolina Department of Human Resources; ALLEN CHILDRESS, in his official capacity as guardian for the plaintiff; BENJAMIN CARPENTER, Director, Gaston County Department of Social Services; JAMES MELTON, Director, Gaston-Lincoln Area Mental Health Program; HARLEY B. GASTON, JR., DAVID BEAM, DAVID HOLLIFIELD, JAMES FORRESTER, DEAN CARPENTER, ROBERT HEAVNER, and PORTER McATEER, in their official capacity as Gaston County Commissioners,

Defendants.

ORDER

Defendant Carpenter has filed a motion for reconsideration of the court's June 8, 1984, award of attorney fees against defendants Carpenter and Melton.

The parties have filed responses to this request.

Upon consideration of the responses, the court DENIES the motion without prejudice to renewal. However, payment of the fees awarded is STAYED until the Court of Appeals for the Fourth Circuit has decided those issues now on appeal or that will be appealed based on the court's orders filed today.

The court also STAYS further litigation in this case, including the class action and intervention proceedings, in the belief that efficiency will be promoted by waiting until the Court of Appeals has ruled on the legal questions addressed in the court's order granting summary judgment to plaintiff Thomas S. This stay does not affect in any way compliance with the final judgment entered this day ordering appropriate treatment for Thomas S.

IT IS SO ORDERED, this 7 day of December, 1984.

James B. McMillan
United States District Judge

APPENDIX I

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division
C-C-82-418-M

THOMAS S., by his next friend, Paul Caldwell,

Plaintiff,

-vs-

SARAH MORROW, Secretary, North Carolina Department of Human Resources; ALLEN CHILDRESS, in his official capacity as guardian for the plaintiff; BENJAMIN CARPENTER, Director, Gaston County Department of Social Services; JAMES MELTON, Director, Gaston-Lincoln Area Mental Health Program; HARLEY B. GASTON, JR., DAVID BEAM, DAVID HOLLIFIELD, JAMES FORRESTER, DEAN CARPENTER, ROBERT HEAVNER, and PORTER McATEER, in their official capacity as Gaston County Commissioners,

Defendants.

ORDER GRANTING CERTIFICATION

On December 7, 1984, the court issued a final judgment based on the order of September 18, 1984, granting summary judgment in favor of Thomas S.

Defendant Morrow has filed a motion for certification under Rule 54(b) of the Federal Rules of Civil Procedure. This motion requests that the court (1) make an explicit finding that there is no reason for delay in entering final judgment and (2) *expressly direct* that judgment be entered.

The court hereby finds that there is no just reason for delay in entering final judgment and expressly directs that final judgment be entered in favor of Thomas S. This requires no further action of the Clerk because final judgment was entered and filed in the record on December 7, 1984.

Defendant's motion for certification is GRANTED.

IT IS SO ORDERED, this 2 day of January, 1985.

James B. McMillan
United States District Judge

APPENDIX J

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States

Amendment XIV

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

General Statutes of North Carolina

§ 108-19. Duties and Responsibilities.

The director of social services shall have the following duties and responsibilities:

(1) To serve as executive officer of the board of social services and act as its secretary.

(2) To appoint necessary personnel of the county department of social services in accordance with the merit system rules of the State Personnel Board.

(3) To administer the programs of public assistance established by this Chapter.

(4) To administer funds provided by the board of commissioners for the care of indigent persons in the county under policies approved by the county board of social services.

(5) To act as agent of the Social Services Commission in relation to work required by the Social Services Commission in the county.

(6) To investigate cases for adoption and to supervise adoptive placements.

(7) To issue employment certificates to children under the regulations of the State Department of Labor.

(8), (9) Repealed by Session Laws 1973, c. 1339, s. 2.

(10) To supervise boarding homes, rest homes and convalescent homes for aged or infirm persons, under the rules and regulations of the Social Services Commission.

(11) To investigate, prepare, and submit petitions for the sterilization of eligible county residents to the Eugenics Commission and to arrange for operations authorized by the said Commission.

(12) To assist and cooperate with the Department of Correction and the Department of Correction and their representatives.

(13) To keep informed of the condition of persons discharged from hospitals for the mentally ill.

(14) To investigate reports of child abuse and neglect and to take appropriate action to protect such children pursuant to the Child Abuse Reporting Law, Article 8 of Chapter 110 of the General Statutes.

(15) To accept children for placement in foster homes and to supervise placements for so long as such children require foster home care. (1917, c. 170, s. 1; 1919, c. 46, s. 3; C.S., s. 5017; 1941, c. 270, s. 5; 1957, c. 100, s. 1; 1961, c. 186; 1969, c. 546, s. 1; 1971, c. 710, s. 5; 1973, c. 476, ss. 133.3, 138; c. 1262, s. 109; c. 1339, s. 2.)

§ 122-35.36. Definitions.

. . . . . .

(2) Area Mental Health, Mental Retardation, and Substance Abuse Board. — A group of persons appointed by the county commissioners pursuant to the provisions of this Article to serve as the governing body of the area mental health, mental retardation, and substance abuse authority.

§ 122-35.37. Establishment of Mental Health, Mental Retardation, and Substance Abuse Services.

The Department of Human Resources is directed to establish community-based programs of mental health services within catchment areas specified by the Commission. The provision of services shall be a joint undertaking of the Department and the area mental health, mental retardation, and substance abuse authority. The mental health services programs shall be developed by coordinating resources, personnel, and facilities of the area mental health, mental retardation, and substance abuse authorities and of the Department of Human Resources, pursuant to this Article. Mental health services shall include, but not be limited to, programs for:

(1) General mental health, mental disorder, and mental health education;

(2) Mental retardation; and

(3) Substance abuse.

Such mental health services programs shall include, but need not be limited to, treatment and preventive services. (1971, c. 470, s. 1; 1973, c. 476, s. 133; c. 661; 1977, c. 568, s. 1; c. 679, s. 7; 1979, c. 358, ss. 3, 23; 1981, c. 51, s. 3.)

§ 122-35.39. Designation of the Local Governmental Units to Specify Responsible Area Mental Health, Mental Retardation, and Substance Abuse Authority.

(a) An area mental health, mental retardation, and substance abuse authority, with approval of the Department of Human Resources and the Commission shall be established by: (i) the board of county commissioners or (ii) jointly by two or more boards of county commissioners.

(b) The unit shall be known as an area mental health, mental retardation, and substance abuse authority. County commissioners shall appoint the members of an area mental health, mental retardation, and substance abuse board who shall thereafter serve at the pleasure of the county commissioners by whom such appointments were made. The area mental health, mental retardation, and substance abuse board thus appointed shall be the area mental health, mental retardation, and substance abuse authority for the purposes of this Article.

(c) In areas consisting of more than one county, each board of county commissioners within the area shall appoint one commissioner as a member of the area mental health, mental retardation, and substance abuse board. These members shall appoint the other members.

(d) The group of county commissioners authorized to make appointments to the area board shall appoint new members to the area mental health, mental retardation, and substance abuse board to fill vacancies occurring on the board prior to the expiration of the appointed term of office. Such appointments shall be for the remainder of the unexpired term of office. (1977, c. 568, s. 1; c. 679, s. 7; 1979, c. 358, ss. 5, 23; 1981, c. 51, s. 3.)

§ 122-35.43. Submit Application for Service Program; Annual Plan.

(a) Subject to the standards of the Commission, the area mental health, mental retardation, and substance abuse authorities shall review and evaluate the area needs and programs in general mental health, mental illness, mental retardation, substance abuse, and related fields, and shall develop with the Department of Human Resources an annual plan for the use, control, and development of State, regional, and area facilities and resources in order to provide a comprehensive program of mental health services for the area residents.

(b) The annual plan of work shall include an inventory of existing services, services to be provided during the next fiscal year, and projected services during the following year, including, but not limited to, service plans for the mentally ill, mentally retarded, and substance abuser. The annual plan shall indicate the expenditure of all State, local, and federal funds for each service according to the source of the fund. The annual plan of each area authority shall include a plan for contracting with the State mental hospital, center for the mentally retarded, and alcoholic rehabilitation center where such facilities are available. Before State funds are provided to area mental health, mental retardation, and substance abuse authorities, such annual plans and subsequent changes shall be subject to approval by the Department of Human Resources. (1977, c. 568, s. 1; c. 679, s. 7; 1979, c. 358, s. 12; 1981, c. 51, s. 3.)

(c) The annual plan shall include the plan developed for the maximum utilization of community and area mental health facilities which is required by G.S. 122-58.16.

(d) The annual plan may incorporate the area authority's proposal to be designated as a single portal area as defined in G.S. 122-35.36(13) and (14). The proposal shall include but not be limited to:

(1) A specific listing of facilities to be covered by the single portal of entry and exit policy;

(2) Procedures for review of persons to be admitted to or discharged from these treatment facilities;

(3) Procedures for shared responsibility when persons are admitted directly to a treatment facility;

(4) Evidence of incorporation of these plans within the contracts between the area authority and the regional facilities as required in subsection (a) above and with other public and private agencies as required in G.S. 122-35.49;

(5) Evidence of cooperative arrangements with local law enforcement, local courts and the local medical society; and

(6) Procedures for review of citizen complaints. (1977, c. 568, s. 1; c. 679, s. 7; 1979, c. 358, s. 12; 1981, c. 51, s. 3; 1983, c. 383, s. 3.)

§ 122-35.49. Contract for Services; Claims Against Providers.

(a) The area mental health, mental retardation, and substance abuse authority may contract with other public or private agencies, institutions, or resources for the provision of services, but it shall be the responsibility of the area mental health, mental retardation, and substance

abuse authority to insure that such contracted services meet the rules and regulations as set by the Commission. Terms of the contract shall require the area mental health, mental retardation, and substance abuse authority to monitor the contract to assure that minimum standards are met.

(b) The area authority may also provide the other public or private agenices, institutions or resources with funds to purchase liability insurance, to provide legal representation and to pay any claim with respect to liability for acts, omissions or decisions by members of the boards or employees of the agencies, institutions and resources with whom the area authority contracts; provided, that the acts, omissions and decisions must arise out of the performance of the contract and must not result from actual fraud, corruption or actual malice on the part of the board members or employees. The provisions of G.S. 122-35.40B and 122-35.40C shall apply to both single county and multi-county area mental health, mental retardation and substance abuse authorities. (1977, c. 568, s. 1; c. 679, s. 7; 1979, c. 358, s. 18; 1981, c. 51, s. 3; c. 539, ss. 3, 4.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an Assistant Attorney General for the State of North Carolina, and that I have served copies of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT by depositing same in the United States mail at Raleigh, North Carolina, first class postage prepaid to:

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This the 27th day of March, 1986

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EDITOR'S NOTE

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CLERK

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NO. 85-1590

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

PHILLIP J. KIRK, JR.,

PETITIONER,

v.

THOMAS S., appt't guardian ad litem,
JOYCE BROOKS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. DID THE DISTRICT COURT CORRECTLY RULE THAT THOMAS S. HAS A SUBSTANTIVE DUE PROCESS RIGHT TO MINIMALLY ADEQUATE TREATMENT PROTECTED BY THE FOURTEENTH AMENDMENT AS INTREPRETED BY THE SUPREME COURT IN YOUNGBERG v. ROMEO, 457 U.S. 307 (1982)?

II. WAS THE STATE RESPONSIBLE DIRECTLY, AND INDIRECTLY THROUGH LOCAL GOVERNMENTAL AGENCIES UNDER ITS SUPERVISION AND CONTROL, FOR PROVIDING TREATMENT REQUIRED BY THE FOURTEENTH AMENDMENT?

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NO. 85-1590

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

PHILLIP J. KIRK, JR.,

PETITIONER,

v.

THOMAS S., appt't guardian ad litem
JOYCE BROOKS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondent Thomas S. respectfully requests this Court to deny the petition for a writ of certiorari seeking review of the Fourth Circuit Court of Appeals' judgment in this case, as reported at 781 F.2d 367.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Petitioner's Statement of the Case contains many factual inaccuracies with no citation to the Record to support his assertions. Thus, to give the Court an accurate view of the facts, the respondent is obliged to provide the following summary of the facts with references to the Record.

Thomas S. is a twenty-two year-old, legally incompetent ward of the State of North Carolina. He has spent his entire life in state custody or control and has lived in over forty foster homes, rest homes, psychiatric hospitals, and other institutions. When summary judgment was entered by the district court, Thomas was housed in the Gaston County detoxification facility because the defendants had no other place to put him. The facts leading to his placement in the detoxification facility are summarized below and are drawn from defendants' admissions, affidavits, the decision of the Fourth Circuit Court of Appeals, and other undisputed sources.[1]

Thomas' mother gave him up for adoption at birth, so that from infancy until age eighteen he remained in the custody

---

[1] The decision of the Court of Appeals (Petition, App. A) contains a thorough chronology of Thomas' treatment history and recommendations of professionals who have evaluated him. It was accurately and painstakingly gleaned by the court from the voluminous record in this case. Respondent's summary of facts will be more succinct but is entirely consistent with the facts described in Court of Appeals' decision.

of the Gaston County Department of Social Services (hereinafter, "DSS"). No adoptive placement was ever arranged. Shortly after Thomas' eighteenth birthday, DSS initiated an incompetency proceeding, and thereafter Thomas was declared legally incompetent. Defendant Allen Childress was appointed guardian for Thomas under the authority of N.C.G.S. §122-24.1 and §35-1.28 in his official capacity as Regional Adult Mental Health Specialist of the Department of Human Resources (hereinafter referred to as "DHR"), Division of Mental Health, Mental Retardation, and Substance Abuse Services. (Petition, A 3-6 [Court of Appeals' decision]).

Thomas has had many diagnoses, including schizophrenia and borderline mental retardation. Petitioner Kirk[2] concedes that he presently suffers from "borderline personality disorders with mixed features." (Appendix C, which is the Joint App. to the Fourth Circuit, 57-58). Whether or not he is mentally retarded is irrevelant to the issues presented by this petition.

Thomas' present problems as a legally incompetent adult are inextricably tied to the problems which he faced as a child in the care and custody of DSS. In an affidavit submitted by Petitioner Kirk, one of his employees, Broughton pyschologist William Wellborn, said, "[i]t should be noted that since the age

---

[2]North Carolina Department of Human Resources (DHR) Secretary Phillip J. Kirk, Jr., has been substituted for the initial defendant, Sarah T. Morrow, who was sued in her official capacity as DHR Secretary.

of six days, Tom has lived in a total of forty different foster homes and institutions in Western North Carolina." (App. C, 101).

Through the years of Thomas' childhood, DSS caseworkers had resorted to placing Thomas in any spot available and were unable to provide consistent support and guidance to assure that the placements were appropriate or successful. Thomas' odyssey carried him to a Burke County rest home for the elderly, Gerald's Lazy Acres, where he remained from June 1981 until March 1982. By defendants Kirk's and Childress' admission, the rest home was an inappropriate placement. Defendants concede that there were no appropriate homes or other appropriate community based treatment facilities in Gaston County where Thomas could have gone during this period. (App. C, 59).

Thomas was living at Gerald's Lazy Acres in February 1982 when Allen Childress was appointed as his guardian. Upon his appointment,

> The guardian visited Thomas at Lazy Acres and decided that the rest home was an inappropriate placement. The guardian later commented on Thomas' condition at the time: "He weighed 197 pounds and was taking five separate medications, which effectively subdued his personality. He was the only person of his age in that rest home. He had no social or recreational or educational or vocational opportunities, and no access to therapeutic counseling." Sleeping, eating, and listening to the radio were Thomas' main activites at Lazy Acres. He gained at least 25 pounds and became emotionally unstable and hallucinatory.

Court of Appeals decision, (Petition, App. A 6, 7).

Childress, acting as Thomas' guardian, had him admitted to the "R" (mental retardation) unit at Broughton Hospital on

March 15, 1982. This was Thomas' fourth admission to Broughton Hospital. One of the reasons that Childress placed Thomas at Broughton in the first place was to give Gaston County officials an opportunity to identify appropriate resources for Thomas needs. (App. C, p. 203).

When Thomas was admitted to Broughton, petitioner knew that community placement -- not psychiatric hospitalization -- had been prescribed following two separate evaluations by two state agencies, the Psychiatric Clinic at North Carolina Memorial Hospital in Chapel Hill, North Carolina and by the Division for Developmental Disorders of Learning (hereinafter referred to as "DDDL") at the University of North Carolina in Chapel Hill. (Petition, A 5-6). Following his placement at Broughton Hospital in March 1982, Thomas was again evaluated by the staff at Broughton, and community placement was again recommended (App. C, 105). Defendant Childress accepts the DDDL evaluation as valid and considers the Broughton evaluation to be "very consistent" with the DDDL evaluation. (App. C, 208-209). The DDDL evaluation recommended, among other items:

a. An educational program to address the deficits in academic skills and to expand his general knowledge . . . .
b. Ongoing psychotherapy.
c. Opportunities for social interactions with his peers.
d. Consistent medical care.
e. Pre-vocational training . . . .
f. Training in self-care and domestic skills.
g. Sex education.
h. Opportunities to practice in the community the skills he already has and those he will be acquiring before he is discharged from this supervised environment.

Upon Thomas' March 1982 admission to Broughton, treatment plans were designed for him that anticipated community placement "within three to six months." Further, defendants admitted that "Tom basically needs to be a part of a home where he can establish family ties in order to mature and develop through the natural progression of growing up to adulthood. He was hardly ever in any place long enough to put down any roots." (App. D, 274).

In discussing Thomas' needs, Childress stated that it was "very important" for Thomas to develop relationships with non-handicapped peers his own age. According to Childress, "[h]e is developing a resistance in being housed and located with handicapped people." (App. C, 210). Defendants Kirk and Childress admit, however, that Thomas had little opportunity at Broughton Hospital to interact with non-handicapped persons other than human services providers employed there. (App. C, 210; App. D, 265-266).

Similarly, Broughton was unable to give Thomas opportunities to practice his independent living skills in the community, as prescribed by DDDL. In answer to interrogatories executed on January 7, 1983, Defendants Kirk and Childress stated, "Thomas S. now needs an opportunity to exercise these skills in the community when placement is identified." [emphasis added] (App. D, 272). In other words, at the time Kirk and Childress made this statement, Thomas had sat in Broughton for over nine months without an

opportunity or the motivation to exercise community living skills that had consistently been prescribed by treating professionals evaluating him.

Kirk's and Childress' own records are filled with admissions that the main reason that Thomas remained in Broughton for so long was that there was simply no appropriate place for him to go. (As stated previously, one of Childress' reasons for admitting him to Broughton in the first place was to enable Gaston County officials to identify appropriate community resources for his needs.) As early as June 2, 1982, a Broughton Hospital professional wrote to Lincoln Area Mental Health stating:

> "We anticipate that Tom will be discharged by the [Burke County District] court on June 17, 1982.
>
> . . . .
>
> "We have identified the following needs as priority:
>
> 1. Community-based living either in a group home or adult foster care home.
> 2. Sheltered Workshop activities or some type of daily vocational training activity.
> 3. Involvement with the local mental health center for medication review and counseling to improve his self-concept/self-esteem.
>
> The team feels that Tom basically needs to be a part of a home where he can establish meaningful relationships and that will provide structure to allow him to mature and develop through a natural progression to adulthood."

Court of Appeals Decision, (Petition App. A 8).

On June 25, 1982, Allen Childress wrote a letter to the director of the Gaston-Lincoln Area Mental Health Program, stating:

> "It was immediately evident in the meeting at the Gaston Mental Health Center on May 21st that Gaston County simply has no appropriate facilities to handle young adults with emotional problems such as Tom's . . . .
>
> A follow-up to May 21st meeting held at Broughton Hospital on June 10th concluded that, "while Gaston County Agencies could respond to some of Tom's need," they did not have the comprehensive array of services which would permit Tom to return to Gaston County. . . . I feel that Tom has been moved around too much during his short lifetime. He needs, as stated above, a stable home, meaningful relationships and sufficient structure to permit him to grow and develop. And as his guardian I feel that Gaston County has an obligation to provide the services for Tom which allow him an opportunity to live and work in his home community. Since placement at Broughton will not meet Tom's long term needs, we have no alternative other than to work toward community placement in all due speed. This is the only course of action which is in Tom's best interest."

App. C, 174-176).

What did Allen Childress mean when he wrote on June 25, 1982, that community placement should be arranged with "all due speed"? In his deposition on October 26, 1982, he discussed the letter:

> A: I think at that time [June 25, 1982], that Tom was appropriate [sic] for community placement that would fulfill the needs indicated in the letter.
>
> Q: Is that still the case?
>
> A: Yes. It is more the case.
>
> Q: Why all due speed?
>
> A: Well, all due speed in my usage of the phrase here means that we need to begin a process of placement for Tom. The all due speed could refer to one, two or three months, or something of that nature.

Q: It has been more than one to two to three months since that letter, hasn't it?

A: Yes, it has.

Q: Why was it necessary to do this in one, two or three months?

A: Well, it was my understanding that it was difficult for the community to provide the services necessary for Tom's placement. My thought was that we needed to get onto [sic] that. We needed to develop a plan and start the process of making arrangements for Tom's community placement.

Q: Has that happened?

A: I have no knowledge of that.

App. C, 212-213.

What arrangements were being made in Gaston County for Tom's community placement? None. In a letter to plaintiff's counsel on June 17, 1982, the Gaston-Lincoln Area Mental Health director said:

> "You may remember that the reason [Childress] was appointed his guardian was that services for Tom were simply not available in Gaston County, or to my knowledge, anywhere in the State of Nortn Carolina. . . . We simply cannot provide services that we do not have, and we cannot generate these services without funds being made available to us. It would, therefore, seem to me that the agency to be named would be the Department of Human Resources for the State of North Carolina."

App. C, 170.

Allen Childress concedes that he knew of no appropriate placement facility for Thomas in Western North Carolina. (App. C, 223).

In November 1982, eight months after admission to Broughton, Thomas was still waiting for the treatment prescribed by every professional who had seen him. In that month, according to affidavits submitted by Kirk, a two-day evaluation of Thomas was made by the North Carolina Division of Mental Health to develop a discharge plan. In that plan, these observations were made:

> "Tom is extremely aware that he is living with mentally retarded individuals and often voices his thoughts of not wanting to be around 'those retarded people.' We feel this is a normal and healthy reaction to being housed in this situation.
>
> The team feels Tom has received maximum benefit from training and counseling in the institutional setting and is now ready for community placement. Tom no longer requires custodial care in an institutional level, and continued provision of this would be inappropriate. The desired placement for him would seem to be an adult foster care situation in which he would live in a family home with parents who could provide the love and caring and structure that Tom needs to complete the maturation process toward adulthood.

App. D, 277

A nine-page report prepared by Dr. Wellborn and the treatment team at the conclusion of this evaluation devised a plan for Thomas' discharge from Broughton Hospital on November 24, 1982, which again recommended placement in an adult foster care situation, a group home, or a family care home providing needed services. Thomas' discharge, however, remained months away.

Thomas was finally discharged from Broughton on March 3, 1983 in anticipation of more appropriate treatment under the terms of a one-year consent judgment in this action. Under the terms of the judgment, Thomas lived in a unique, specialized adult foster family setting in Cleveland County. Two local defendants, (later dismissed from the case), Melton and Carpenter, had agreed to enter the consent judgment which expired on February 28, 1984. Petitioner Kirk provided special funding for the treatment.

Thomas' specialized foster family placement was successful for approximately nine months. The placement failed in part because of a sudden interaction with Thomas' natural family and the placement of another person in the foster family. On November 13, 1983, Thomas was involuntarily committed to Broughton Hospital. It was his fifth such hospitalization. On November 30, 1983, Thomas was moved from Broughton to a Morganton group home for the developmentally disabled, the McKay Home.

Thomas remained at the McKay Home until May 18, 1984. While he was a resident of McKay Home, Tom participated briefly in a day treatment program in Caldwell County. Neither the group home nor the day treatment program were suited for Thomas' specific needs, but it was the least objectionable arrangement that his guardian and local government agencies could find given existing programs and facilities in North Carolina. On May 18, 1984, Thomas was moved to a rest home in Wilkes County, but on August 17, 1984, the rest home placement was terminated. The rest home

was not appropriate, and its failure should have been predicted. Approximately ninety adults reside at the rest home, most of whom are geriatric patients. It is not a family-like setting. It is approximately nine miles from town and is not served by public transportation, so that Thomas' participation in community activities was limited. The staff was not trained to meet Thomas' needs.

When Thomas was dismissed from his Wilkes County treatment program, he was returned to Gaston County. Once again, there was no place for him to go, so he was housed in the Gaston County detoxification facility. Petitioner Kirk calls this placement a "night care facility."[3] Thomas was held in "night care"

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[3]Petitioner Kirk has consistently tried to characterize this detoxification facility as "night care" and has even taken to spelling it as a proper noun, as if to give it special significance ("Night Care"). At the time of entry of summary judgment, however, the record showed without dispute that Thomas S. was housed in the Gaston County detoxification facility. (App. D, 368-369). The District Court also described the facility as detoxification. (Petition, App., A-49). When counsel for petitioner attempted to deny that Thomas was housed with alcoholics in oral argument before the Court of Appeals, respondent filed a supplemental brief containing an affidavit of Thomas S. to illuminate the record that was before the court at the time summary judgment was entered. (Respondent, App. B). His affidavit shows that there is no practical distinction between night care and detox, that residents are supervised by the same staff, eat the same food brought to them in styrofoam from the Gaston County jail, reside on the same ward, and congregate in the same common areas. For the sake of having company, Thomas sometimes attended Alcoholic Anonymous meetings held in the facility. Thomas has never had a drug or alcohol problem.

for almost seven months, living with a transient population of alcoholics and drug abusers before finally being placed with a specialized, adult foster family recruited and trained under the terms of the district court judgment. Petitioner has attempted to characterize this "night care" as a noninstitutionalized community placement that would somehow serve as a reason for granting the writ. (Petition, p. 6). There is nothing in the record showing that his placement in the detoxification facility was based on any professional judgment, that Thomas has a drug or alcohol abuse problem, or that being housed with others who do have such problems would answer his treatment needs. (Petition, App. A 15-17 [Court of Appeals decision]).

B. HISTORY OF THE CASE

On July 7, 1982, Thomas S. brought suit against Sara Morrow, then Secretary of the North Carolina Department of Human Resources; Allen Childress, in his offical capacity as Thomas' guardian; and the directors of two local agencies, the Gaston County Department of Social Services and the Gaston-Lincoln Area Mental Health Program.

The complaint alleged that defendants had denied Thomas' substantive due process rights under the Fourteenth Amendment for failure to provide minimally adequate treatment, that Thomas' hospitalization imposed a degree of restraint on his liberty inconsistent with professional judgment concerning his treatment needs, and that improper treatment violated various state law pro-

visions. An amended complaint later charged that defendants had deprived Thomas of substantive liberty interests created by state law. Thomas requested injunctive relief requiring defendants to place him in an appropriate treatment setting and provide other treatment recommended by professionals who had examined and worked with him. Unlike Youngberg, infra, no damages were sought.

The court entered a one-year consent order on May 26, 1983, permitting the two local agency defendants to contract with an independent non-profit organization for foster care treatment through March 1, 1984. Because of the consent order, the court deferred all parties' summary judgment motions and declared the case inactive until February 1, 1984.

The case was later reactatived, and the district court ruled on cross motions for summary judgment on September 18, 1984. Various claims against state defendants under state law were dismissed, and the court dismissed without prejudice claims against local officials. It also granted summary judgment against Petitioner Kirk and Thomas' guardian, Allen Childress.

On December 7, 1984, the court entered a final judgment requiring Kirk and Childress to develop a treatment plan for Thomas. It further directed these defendants to furnish Thomas with treatment recommended by the qualified professionals who had evaluated his needs, including suitable residential placement and non-residential services.

The defendants appealed, and the district court judgment was unanimously affirmed on January 9, 1986, in a decision reported at 781 F.2d 367 (Petition, App., A). Thereafter, Petitioner Kirk's petition for rehearing was denied (Petition, App., B), and his motion for stay of mandate was similarly denied (Petition App. C).

SUMMARY OF ARGUMENT

A.

The district court correctly ruled that Thomas S. has a substantive due process right to minimally adequate treatment protected by the Fourteenth Amendment as intrepreted by he Supreme Court in Youngberg v. Romeo, 457 U.S. 307 (1982).

The district court and the Court of Appeals carefully followed the guidelines established by the Supreme Court in Youngberg in finding that the treatment that Thomas S. has received departs substantially from the recommendations of Petitioner Kirk's treating professionals and others who have evaluated Thomas. The court further found that Thomas was entitled to receive minimally adequate treatment based upon clearly identified liberty interests.

The decision is entirely consistent with the decison of every circuit court that has considered the issue since Youngberg.

B.

The district court correctly held Petitioner Kirk ultimately responsible for providing services and supervising local government agencies under his control.

Petitioner Kirk's argument that local agencies should be responsible for Thomas' treatment totally ignores North Carolina

law that makes petitioner responsible for the conduct of the local agencies. Further, petitioner Kirk did not appeal the dismissal of the local agencies as parties in this action.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT THOMAS S. HAS A SUBSTANTIVE DUE PROCESS RIGHT TO TREATMENT PROTECTED BY THE FOURTEENTH AMENDMENT.

A. Thomas S. has standing to claim the right to treatment established in Youngberg v. Romeo because from birth he has been under state guardianship and control.

In Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed. 2d 28 (1982), the Supreme Court held that an involuntarily committed, mentally retarded adult has a substantive due process right to treatment. Petitioner Kirk seems to claim that Youngberg has no bearing on Thomas' case because Thomas is not similarly situated. According to Kirk, Thomas is not subject to the control of the state, so that no constitutional rights are implicated. (Petition, p. 7). He makes this claim by totally ignoring the facts in the record, creating a fictitious plaintiff more to his liking, and arguing his case based upon his fiction. Unfortunately, Thomas S. is not a fictional character. When the district court entered summary judgment, Thomas was institutionalized in the Gaston County Detoxification Facility.

Petitioner attempts to characterize this detoxification placement as community living free of state action or state control. Thomas stayed there from August 1984 until February 1985. He was placed by Kirk's agents because they had no other place

for him to go. There is absolutely nothing in the record to suggest that Thomas has ever had a drug or alcohol problem, and Kirk has offered no justification for his confinement in the detoxification facility. (Petition, A 15-17 [Court of Appeals decision]). As a result of the district court's judgment, Thomas was finally released from the detoxification facility and placed with an adult foster family. (Joint App. D, p. 268). He did not choose to live in the detoxification center, and he could not choose to leave because Allen Childress has been appointed his guardian in his official capacity as a DHR employee. Only Allen Childress has legal authority to make those decisions for Thomas. N.C.G.S. §35-1.1 et seq. Except for a brief period between his eighteenth birthday and the appointment of Childress as his guardian, Thomas has spent his entire life in state custody and control. The state has total control over what Thomas eats, where he sleeps and how his money will be spent. Many of the problems he now faces as a legally incompetent adult are rooted in inappropriate treatment and placement as an adult under state guardianship and control and that he faced as a child in the custody of the Gaston County DSS, which is under petitioner Kirk's control and is his agent by state law. N.C.G.S. §108A-14(5).

Thomas S. was declared incompetent, and Allen Childress was appointed as his guardian under the provisions of North Carolina's Guardianship Act, N.C.G.S. §35-1.6 et seq. Childress is Thomas' guardian. Thomas is Childress' ward. Childress is

acting as Thomas' guardian in his capacity as a state employee. Therefore, Thomas is a ward of the state, and the guardian's actions restricting Thomas' liberty constitute "state action." Parham v. J.R., 442 U.S. 584, 600-1 (1979).

The court of appeals correctly noted that the district court's reliance upon Youngberg was proper:

> There are, of course, differences between Youngberg and Thomas' case. In Youngberg the court dealt with a claim for damages against state officials for breach of constitutional rights. 457 U.S. 311. Thomas does not sue for money; he seeks only the treatment that professionals at a state hospital have prescribed. But this distinction between the cases does not militate against Thomas. The principles undergirding the court's decision and the action for damages afford a sound foundation for the exercise of equitable powers to fashion remedial, prospective relief. See, Scott v. Plante, 691 F.2d 634, 637 (3rd Cir. 1982). Much of Youngberg necessarily addresses the situation of a single patient confined to an institution, but the court did not intend the liberty interest it identified to be limited to that circumstance. The liberty interest protected in Youngberg did not arise because of the institutional confinement. Rather, the court's premise was that involuntary commitment and other lawful confinement "do not extinguish" pre-existing liberty interests in safety and freedom from bodily restraint. 457 U.S. at 315.

Petition App., A-15.

There is no substantive difference between the involuntarily committed plaintiff in Youngberg and Thomas, who has been "volunteered" for commitment by his court-appointed guardian. Both actions involve "massive curtailment of liberty" against an

individual through state action. Humphrey v. Cady, 405 U.S. 504, 509 (1972).

If Thomas S. had not spent his entire life under state guardianship and control, if he had voluntarily chosen to live in the detoxification facility after intelligently considering other residential options, if he could have voluntarily left the facility, and if he could make decisions for himself concerning his treatment, then perhaps petitioner's argument would have merit. But given the state's total control over Thomas' life, liberty, property and treatment, Thomas is entitled to minimally adequate treatment under Youngberg.

B. Thomas S. has been denied minimally adequate treatment prescribed by qualified mental health professionals who have evaluated his needs.

The district court held that the substantive due process liberty interests recognized in Youngberg require defendants Kirk and Childress to provide Thomas with reasonable treatment consistent with professional judgment. (Petition App., A 32-39). The plaintiff in Youngberg was profoundly mentally retarded with an I.Q. of 8 to 10, and his attorneys noted that no amount of treatment would make his release from the hospital possible. 102 S.Ct. at 2459. Thus, the Supreme Court held that under the plaintiff's particular circumstances, the only liberty interests implicated required the state to "provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint." Id. at 2460. In so holding, the Court noted that the

training or treatment should be tailored to the particular needs of the individual:

> It is not feasible, as is evident from the variety of language and formulations in the opinions below and the various briefs here, to define or identify the type of training that may be required in every case. A court properly may start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy, in terms more familiar to courts, may be stated as that training which is reasonable in light of identifiable liberty interests and the circumstances of the case. A federal court, of course, must identify a constitutional predicate for the imposition of any affirmative duty on a state.

102 S.Ct. at 2460, n. 25.

The Court unanimously noted the following liberty interests in Youngberg:

1. Reasonable care and safety, 102 S.Ct. at 2454, 2457, 2458, 2461.

2. Freedom from bodily restraint, Id. at 2454, 2458, 2461.

3. Adequate food, shelter, clothing, and medical care. Id. at 2458.

4. Adequate training or treatment to ensure the enjoyment of liberty interests that are recognized as constitutionally required. Id. at 2460, n.25.

While the Court was careful to limit its decision to the particular circumstances of the case, the Court clearly indicated that its holding left open the existence of other, additional rights, such as a general right to habilitation or treatment. Id. at 2459.

The Court held that the standard for determining whether the constitutionally mandated treatment has been provided is that the treatment is provided according to professional judgment. Id. at 2462. Liability for money damages should be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment. Id.

Youngberg was a malpractice action for money damages resulting from inappropriate treatment. In this case, Thomas sues for prospective declaratory and injunctive relief only. The district court and court of appeals here correctly recognized that those same liberty interests in Youngberg could also be protected by injunctive relief -- to prevent further denial or harm -- if damages could be awarded for past denial of such liberties. (Court of Appeals Decision, Petition, A-3).

The particular treatment needs of Thomas S. are best illustrated by an assessment performed by Petitioner Kirk's employee, Broughton psychologist William Wellborn, contained in an affidavit submitted to the court by Kirk and quoted by the court of appeals in its decision, which included:

1. Placement in a group home with adults of average intelligence without severe emotional difficulties. (stable environment with structure).

2. Counseling by both male and female therapists regarding conflicts in establishing relationships with both men and women.

3. Exposure to many social situations outside of the instituional environment (e.g. shopping, dining out, short trips, etc.)

4. Placement in an environment that will allow balance between supervision and freedom so that Tom will not feel rejected.

5. Training in mathematics and money management.

6. Training in a specific trade like auto mechanics so that Tom will more likely be able to support himself in the future.

Petition App., A 34-35.

The district court noted that while the details of recommended treatment have varied according to the individual making the assessment, the common treatment elements are:

1. A stable environment -- i.e., a relatively permanent placement.

2. A non-institutional adult foster care situation which would allow Tom to function as a family member with some supervision but with relatively few restrictions.

3. Basic educational training and vocational training.

4. Therapy and counseling.

App. D, p. 408; see also, App. D, p. 396.

These treatment recommendations were made by petitioner Kirk's own professionals and by defendant Childress. In the face of these treatment recommendations and Thomas' unexplained six-month confinement to the Gaston County Detoxification Facility, petitioner still argues that "the Court of Appeals clearly failed to show any deference whatsoever to the decisions made by those professionals who actually arranged and provided respondent's community treatment." (Petition, 8).

The district court carefully adhered to these treatment prescriptions developed by Kirk's own experts in its summary judg-

ment order and was careful to note that future treatment should be guided by the decisions of qualified professionals. (App. D, pp. 407-409, 424-425). In its decision, the Court of Appeals went to great lengths to summarize the record that was before the district court at the time judgment was entered, and upon this record made this observation:

> We reject the Secretary's claim that geniune issues of material fact preclude summary judgment. Although the evidence presented in Thomas' behalf is voluminous, the district court did not rest on it. Instead, the court based summary judgment on the reports and recommendations of the Secretary's professionals at Broughton Hospital, which were introduced into evidence by the Secretary. The guardian, through his counsel, also acknowledged:
>
> What Tom needs is as follows:
>
> a. A room to stay in, to meet his needs for privacy, within a supervised time with resident managers;
>
> b. Provision of meals at scheduled times;
>
> c. Developmental skills training, in self-care and housekeeping as needed;
>
> d. Outside program resources, as needed:
>
> i. Vocational training
> ii. Psychosocial rehabilitation
> iii. Adult basic education
> iv. Individual therapeutic counseling
> v. Supportive/behavior counseling and
> vi. Case management.
>
> This represents a concensus of those involved in Tom's treatment for the last one and half years. If his needs are many, we point out that substituting for twenty years of no family and little or no treatment is not an easy thing.

Petition, A-19-20.

violation have been shown, "the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971).

Petitioner Kirk argues that if Thomas has a constitutional right to treatment, then the treatment provided by his agents and employees has been appropriate under the Youngberg standard. He bases his claim on Mr. Justice Powell's statement that courts "must show deference to the judgment exercised by a qualified professional." 102 S.Ct. at 2461, 73 L.Ed. at 48. If such judgment was in fact exercised, decisions concerning treatment would be "presumptively valid." 102 S.Ct. at 2462, 73 L.Ed.2d at 42. Thus, according to Kirk's reasoning, the court can look no further than to determine whether professionals have approved of Thomas' treatment while under state control or guardianship. His reasoning is erroneous for the reasons outlined below.

If the Youngberg standard requiring deference to the opinions of qualified professionals is applied correctly in Thomas' case, the undisputed facts show that he has been denied treatment prescribed by the professionals who have evaluated his needs. As outlined in the statement of facts above, the DDDL evaluation conducted before Thomas was ever admitted to Broughton in 1982 prescribed community placement. Once he was admitted to Broughton, Thomas' guardian and hospital professionals consis-

tently recommended community treatment. Nevertheless, he remained confined to Broughton for a full year. More recently, he was sent back to Broughton for his fifth hospitalization and was kept in an inappropriate geriatric rest home and a detoxification facility. (App. D, pp. 328-330, 373). Petitioner Kirk evades this denial of prescribed treatment by deeming Thomas' treatment "appropriate" since professionals have been involved in making all decisions. That those "decisions" have been seriously compromised by the acknowledged lack of needed programs and facilities is ignored by Kirk. He is content to justify his stay in Broughton for months beyond the point where professionals recommended his discharge by saying, "[i]t is in his best interest to remain at Broughton until appropriate community placement is identified . . . ." (App. C, pp. 169-170). He offers no justification in the record for his stay in the Gaston County Detoxification Facility for six months.

In effect, Petitioner Kirk's argument under Youngberg has begged the real question. He argues that because professionals were standing around while Thomas was in his custody, nothing done to Thomas is constitutionally suspect. The professionals' judgment and recommendations were severly compromised because Kirk did not allow their judgment to be implemented. Kirk ignores the undisputed professionals' judgment that Thomas should not have been placed or confined in Broughton at all in 1982, that his placements since November 1983 have been inappro-

priate, and that but for the state's unwillingness to provide the professionally prescribed community placement of Thomas, he would not have spent six months in the Gaston detoxification facility. Thomas' "treatment" has been unnecessarily restrictive of his liberty, has not provided the home place he needed, and has not provided the social and psychological setting prescribed for developing his skills.

Thomas cannot be denied appropriate treatment in this manner simply because defendants contend that there is no proper treatment available. The district court held that the lack of alternatives is not sufficient to outweigh the drastic deprivation of Thomas' personal liberty caused by the confinement at Broughton, inappropriate rest homes, and the Gaston detoxification facility. (App. D, pp. 409-410). His right to treatment is meaningless if the state is allowed to place him wherever it pleases. In a case involving a Texas juvenile facility, the court stated this principle succinctly:

> But this procedure [inquiry into whether appropriate treatment should be provided] is hollow if there are, in fact, no alternatives to institutionalization. The state may not circumvent the Constitution by simply refusing to create any alternative to incarceration; it must act affirmatively to foster such alternatives as now exist only in rudimentary form . . . and to build new programs suited to the needs of the hundreds of its children that do not need institutional care (e.g. patient clinics, home placements with close supervision.)

Morales v. Turman, 383 F.Supp. 53, 125 (E.D.Tex. 1974); rev'd 535 F.2d 864 (5th Cir. 1976); reinstated 430 U.S. 322 (1977), 97 S.Ct. 1189, 51 L.Ed.2d 368, reh. denied 430 U.S. 988.

C. There is no conflict among circuit decisions that would justify granting the petition.

Petitioner alleges that the court of appeals' decision in this case creates a conflict among the circuits regarding the individual's right to treatment in the aftermath of Youngberg. There is no conflict among the circuits, and to grant certiorari on that basis would be improvident. A review of post-Youngberg circuit court decisions cited by petitioners shows that the Court of Appeals decision in the case is not only true to Youngberg, but is also consistent with other circuit decisions.

There is no split of authority among the circuits over whether the liberty interests recognized in Youngberg could be protected by injunctive relief. The only other circuit to consider any distinction between damages and injunctive relief is the Third Circuit, which held that a defendant's constitutional treatment responsibility in cases of prospective relief is much broader. In Scott v. Plante, 691 F.2d 634 (3rd Cir.1982), the court said:

> Finally, we note that Youngberg v. Romeo involved only a claim for money damages for past infringements of the right to treatment . . . . The Court's decision does not inform at all as to the appropriate reach of injunctive relief for the protection of liberty interests created by state law, and the holding is not necessarily dispositive of the scope of prospective relief for the protection of the fourteenth amendment liberty interests which it recognized. Obviously the problem of hindsight interference with decisions made by hard-pressed staff members of state mental institutions is a more serious one than that of assisting them in directing prospective injunctive relief against appropriate state officials.

> (citation omitted). Id. at 637 cf. ARC Of North Dakota v. Olson, 561 F.Supp. 473 (1982) aff'd on other grounds, 713 F.2d 1384 (8th Cir. 1983).

691 F.2d at 637.

Thomas' case was analyzed by the fourth circuit under the Youngberg standard. Thus, the broader construction anticipated by Scott v. Plante has certainly been met also. The problem with Thomas is not that the defendants' professionals made unprofessional judgments in diagnosing his needs and prescribing a treatment program. Thomas does not challenge the recommendations of defendants' professionals. The real problem is that defendants defaulted on providing the necessary appropriate treatment. In the words of the district court, "to the extent that any professionally prescribed treatment differed from that set forth above, it differed because the professional's stated judgment was modified to conform to the available treatment, rather than to the appropriate treatment, for plaintiff's condition." (Petition App., A-36).

In Society for Goodwill to Retarded Children v. Cuomo, 737 F.2d 1239 (2nd Cir. 1984), the Second Circuit follows the same Youngberg analysis as did the Fourth Circuit Court of Appeals in the present case. In Society for Goodwill, the court analyzed the facts based on identifiable liberty interests enumerated in Youngberg. 737 F.2d at 1243-1250. In the present case, the court similarly noted that treatment must be measured by identifiable liberty interests following a Youngberg analysis. The

legal analysis in Society for Goodwill and the present case are thus consistent. Where Society for Goodwill differs is in its outcome, based on the facts before the court. In Society for Goodwill, the Second Circuit reversed a district court decision setting a quota of 400 mentally retarded patients to be released for placement in community facilities, after finding that the order was too broadly written to accomplish the intended goal. Id. at 1251.

In Thomas' case, however, the district court ordered the precise treatment prescribed by petitioner's qualified professionals. (Pet. App. A 34-36). The court of appeals correctly noted this factual difference between the two cases. (Pet. App. A 18). As this Court noted in Youngberg, "Because the facts in cases of confinement of mentally retarded patients vary widely, it is essential to focus on the facts and circumstances of the case before the court." 102 S.Ct. at 2460, n. 25. The district court clearly followed this mandate.

Petitioner also cites Phillips v. Thompson, 715 F.2d 365 (7th Cir. 1983) as conflicting with the court of appeals decision in the present case. As with Society for Goodwill, however, Phillips is clearly consistent with the present case in its intrepretation of Youngberg's constitutional requirements but differs on the facts. Phillips analyzed the plaintiff's claims to treatment based on the same identifiable liberty interests listed in Youngberg. These liberty interests served as the same analytical foundation for the present decision in Thomas S.

II. THE DISTRICT COURT PROPERLY HELD PETITIONER KIRK ULTIMATELY RESPONSIBLE FOR PROVIDING SERVICES AND SUPERVISING LOCAL GOVERNMENT AGENCIES UNDER HIS CONTROL.

A. The court properly found Petitioner Kirk liable for his constitutional violations.

In its September 17, 1984, order, the district court found:

> [Kirk] and Childress, like the institution officials in Youngberg, are responsible for the legitimate restraints on plaintiff's liberty resulting from plaintiff's mental imcompetency and wardship; also like the defendants in Youngberg, [Kirk] and Childress are charged with the responsibility that these legitimate restraints are no more restrictive than necessary.

App. D, p. 406).

Since Defendants Kirk and Childress were responsible for depriving plaintiff of his substantive due process liberty interest, the district court ordered them to take remedial action, and this was correctly affirmed by the court of appeals.

The district court noted that the local officials might "share responsibility" under a different constitutional theory. The court, found it unnecessary to "speculate . . . . on who might be responsible when it is clear that [Kirk] and Childress are responsible." (App. D, p. 413). The court, therefore, dismissed the claims against the local defendants without prejudice. Thus, the court found Defendants Kirk and Childress severally (but not necessarily exclusively) liable for constitutional violations. The propriety of a court's finding such entire liabi-

lity for relief by parties that may be jointly liable is well established in American law. Prosser, Law of Torts, 4th Ed. §52.

Contrary to Petitioner Kirk's apparent assertions, the district court did not absolve local government agencies from all responsibility. In its December 7, 1984, final judgment, the district court did not prevent state officials from working through local agencies. In fact, the district court acknowledged the role of the local agencies in furnishing Thomas S. with treatment under the judgment. (Petition, A-42). In addition, the judgment was made binding upon the agents of defendants Kirk and Childress and "those to whom they have assigned or may assign any duties or responsibilities for the care and treatment of Thomas S." (Petition, A-43). The effect of the lower court's decision is to confirm the ultimate responsibility of state officials for purposes of liability under one constitutional theory. See Alexander v. Hill, 707 F.2d 780 (4th Cir. 1983), cert. den. 104 S.Ct. 206 (1983)(state DHR officials responsible for late processing of AFDC and Medicaid applications by local D.S.S. officials).

A federal court in New York found substantive due process violations by the state and not local officials in a clearly analogous, but less compelling, case where the state and local agencies both had responsibilities. Flowers v. Webb, 575 F.Supp. 1450, 1453-1454 (E.D.N.Y. 1983). There, the court found that while the state had delegated the operation of community

programs for mentally retarded perople to local officials, the state had "a substantial responsibility for overseeing and regulating" those services. In light of that statutory scheme, the court determined that the state had "ultimate responsibility" even though the local officials had custody of plaintiff and plaintiff had apparently never been in a state facility. The court in Flowers noted that the state's statutory scheme permitted plaintiff to be admitted to the custody of the local program by plaintiff's parent. In the present case, the court noted that Thomas S., as a ward of the state, may be required at any time to return to the state institution by his guardian, a state official. (App. D, p. 405). The Flowers court also relied on Reynolds v. Sims, 377 U.S. 533, 575 (1964), to note that "political subdivisions of states have never been considered as sovereign entities" but rather as subordinate governmental instrumentalities designed 'to assist in carrying out state governmental functions.'" (quoting Reynolds). Flowers, supra at 1454.

B. The court's findings and orders do not conflict with North Carolina law.

Even if the Court were to divorce consideration of liability for relief from the underlying constitutional violation and examine North Carolina's statutory scheme of responsibility in the abstract, the district court's determination of state official responsibility is proper. Petitioner Kirk failed to explain in his brief the following responsibilities imposed on him and powers granted to him by statute:

(1) Exercising "jurisdiction over . . . joint state- and community-sponsored mental health clinics." N.C. Gen. Stat. §122-1.

(2) Establishing community-based programs. N.C. Gen. Stat. §122-35.37.

(3) Issuing, denying, or revoking operating licenses to area authorities. N.C. Gen. Stat. §§122-35.51 and 122-35.52.

(4) Implementing, administering, and monitoring community-based programs in cooperation with area authorities. N.C. Gen. Stat. §122-35.36(6).

(5) Approving the selection of the area program director and the qualifications of other professionals hired by the area program. N.C. Gen. Stat. §122-35.45(c) and (d).

(6) Paying legal fees, judgments, and settlements for agents, employees, and board members of area authorities. N.C. Gen. Stat. §122-35.40(c) and (d).

(7) Establishing and enforcing rules for area authorities. N.C. Gen. Stat. §122.35-53(g).

(8) Developing and enforcing policy and standards for providing mental health and rehabilitation services with the basic goal of assisting all citizens to achieve and maintain an adequate level of health, social and economic well-being, and dignity. He is charged with the responsibility for emphasizing, whenever possible, preventive measures. N.C. Gen. Stat. §143B-137.

(9) Supervising area mental health programs and administering standards to assure that local programs provide services and operate in compliance with state and federal laws and regulations. N.C. Gen. Stat. §122-35.38.

(10) Assuring that the local authorities and the various divisions of his department work together to assure that there is appropriate care provided for North Carolina residents suffering from mental illness or mental retardaton. N.C. Gen. Stat. §122-35.37.

(11) Providing financial and coordinative assistance to the area mental health authority to assure continuity of care for patients with mental retardation who are discharged from state mental hospitals. N.C. Gen. Stat. §122-55.8. (Thomas S. has claimed that defendants chose to treat him as mentally retarded and are therefore estopped from denying tht he is mentally retarded). (App. C, p. 46)).

(12) Making direct grants to area authorities for community-based treatment "rather than in institutions." N.C. Gen. Stat. §122-35.56.

(13) Cooperating with local health authorities in augmenting, promoting, and improving local residential programs for the mentally ill and mentally retarded. N.C. Gen. Stat. §122-1.2.

Petitioner Kirk can even contract directly with any agency, corporation, or person to fulfill his responsibilities. N.C. Gen. Stat. §143B-139.3. Yet the district court refrained from ordering him to exercise that power. Thus the court's order is temperate and consistent with North Carolina's statutory scheme.

In summary, determination of entire liability is permissible when another defendant is or might be jointly liable. The determination of liability here is rooted in the court's proper identification of the state officials as illegally restraining Thomas S.'s constitutional rights. The determination of the state's ultimate responsibility does not preclude the state from involving local officials and is consistent with North Carolina's mental health service delivery scheme. The area mental health authorities are creatures of the state and completely subject to the authority of the state. For these reasons, the district court properly determined that Petitioner Kirk is responsible for providing services to Thomas S. based on the recommendations of qualified professionals.

The local agencies that Kirk claims should be responsible for Thomas' treatment were initially named as defendents in this

action but were dismissed by the district court. Kirk failed to appeal this dismissal, so that he is now barred from claiming in his Petition that these agents who were dismissed should be totally responsible for treatment.

CONCLUSION

Thomas is in critical need of the treatment ordered under the judgment. According to a letter to the district court from counsel for defendant Childress:

> If appropriate treatment is not provided to Tom he will likely:
>
> a. Become a chronic inmate of Broughton Hospital; or
> b. Be warehoused and medicated in a rest-home for the indefinite future; or
> c. Get in trouble with the law; or
> d. Live or perish as a "street person."

(App. D, pp. 396-297).

Thomas has shown that he is constitutionally entitled to receive the treatment prescribed for him. The petition for certiorari should therefore be DENIED.

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